***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

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motion that was made at that time, if we had put that statement in, if we had not put that statement in would not have made one whit of difference as to what was involved in the motion.

Q Why did you put it in?

A A, because it had been told to me; B, because in terms of setting forth a statement of facts for the Court to look at, that was a statement of facts.

Q You thought it was relevant?

A I thought it gave background. Again, it depends what you mean by relevance, Mr. Mandel. It explained a situation as to the circumstances under which Mr. Aixala came to the transaction for the Judge and for you, when we served you with a copy of the affidavit, to read forth those facts.

Q You thought it was relevant, right or wrong?

MR. GRUTMAN: In that context, I believe the witness has answered the question, your Honor.

Q I will go to the next question, Mr. Roth.

Wasn't the heart of the matter the amount of Aixala's connection with the transaction?

A I agree with you on that, Mr. Mandel. If you limit your question prior to February of 1971, I believe. I think the heart of the matter is whether he was aware of

Gross, Bleich and Donohue and their objections.

Q The heart of the matter is that you were saying poor Aixala is a fellow in Florida who knew nothing about these matters and wasn't a promoter of the corporation, knew nothing about anything, had nothing to do with these matters; he spoke to Persky once and that is the end of it, so, Judge, how can you hold Aixala in here?

MR. GRUTMAN: Objection.

MR. SHAW: Objection. Speech not a question.

THE COURT: Overruled.

A I think what I was saying, Mr. Mandel, was that then and now, the relevant factor is that Aixala was basically relying on Persky's opinion. He did not participat He was not in here in New York during the day by day negotiations. He had no prior connection with the partnership involved. He was a man who came on to the scene relatively late who had no real connection with the partnership in terms of position and who then took a lawyer's recommendation to basically make an investment.

Q The heart of you statement and argument, Mr. Roth, I put it to you, is the statement at the end, "The foregoing constitutes the total involvement of Aixala in the situation alleged in the complaint"; right?

A I don't even know what you are reading from,

Mr. Mandel.

Q I am reading from the last paragraph of your 9-G statement where you don't even say that Aixala was Persky's client and which you denied in your brief; do you remember that?

A I don't remember that.

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

Q You don't remember?

A No.

Q Now, the fact --

MR. SHAW: Are we to have a ruling?

THE COURT: He does not remember.

MR. MANDEL: He does not remember. Either I will produce the brief or I won't.

Q Now, the fact of the matter is before you prepared this you had in your file Risher's affidavit and Persky's affidavit -- Risher's deposition and Persky's deposition; right?

A It depends what you mean. Risher's deposition was taken in two installments, Mr. Mandel. I think the installment to which you were referring was the second day's installment which was taken subsequent to June 26th. Because I remember the deposition that you are talking about. I

remember sitting by Mr. Risher's side representing him. When Mr. Risher testified in response to your questions that Mr. Aixala had -- excuse me, that Mr. Aixala had spoken with him, had supposedly gotten some sort of financial knowledge. But I believe that deposition installment was after June 28th, I believe.

Q Well, you knew that Aixala had been up to see the Stock Exchange, he was that deeply involved in the new corporation; is that correct?

MR. GRUTMAN: At what time did he know it?

MR. SHAW: Objection. That is argumentative. The Stock Exchange and stop. Everything else I object to.

THE COURT: To that extent you knew he was involved; yes?

THE WITNESS: The answer is no. I don't believe that was the state of my knowledge as of that time.

Q You knew that Persky had already testified, that Aixala was his client; right?

A No. I don't believe I even read Mr. Persky's deposition in its entirety at the time that I prepared the Aixala affidavit. I believe I had been on the scene, Mr. Mandel; again for a matter of some weeks at that time.

Q Well, you had a partner who had been there from

the beginning; right?

A I had a partner who was there. It depends what you mean by that. I had a partner named Persky.

Q You had a partner named Gelb who started --

A He is the gentleman sitting in the back row.

Q And Gelb was conducting this litigation before you came into it; right?

A That is correct, sir.

Q And Persky had been deposed before this motion was made?

A That is correct, sir.

Q And in my 9-G statement I pointed out that Persky said that Aixala had been his client; right?

A If you say so, sir. I'm not certain. But if you say so I will accept that.

Q Now, in my 9-G statement, which your brother Grutman has put in evidence, and my colleague, I said,

"Aixala was a client of Persky's from November 1970 on in connection with the formation of the corporation Newburger, Loeb & Company, Inc., and in connection with the negotiations leading to the transfer agreement."

Where did that information come from?

A May I have that question read to me, your Honor? I lost it somewhere in the middle.

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(Question read)

A You mean where you got that information? I don't know where you got that information.

Q It is in Persky's deposition, is it not?

A I have no present recollection of that. That is a matter of record. If you tell me that is the fact, all right. I have no present recollection of that.

Q Now, I said, "Aixala was a signatory to the transfer agreement, Persky's knowledge and acts are attributa to his client, Aixala."

Was that a fair statement for me to make?

MR. GRUTMAN: Objection.

MR. SHAW: Objection, your Honor. Irrelevant.

THE COURT: I will sustain it.

Q Now, in your opinion if the record showed that Aixala had been in conferences with Risher and they had discussed the financial affairs of the corporation, that would be in derogation of the motion you were making; right?

A I'm not certain of that, that that follows. I think it would depend on what the nature of the discussions were. If Mr. Aixala had been told in a discussion prior to February of 1971 that Bleich, Gross & Donohue, that there was a partnership that Gross, Bleich and Donohue had

partnership status and that by virtue of that partnership status were objecting to the transfer, that might have been a derogation of my motion.

MR. MANDEL: I move to strike.

THE COURT: I will permit it to stand.

Q The thrust of your effort was to say that Aixala had almost nothing to do with these matters; is that correct?

A Well, prior to February 11th, prior to the signing of the transfer agreement.

Q That is correct. And if Persky was Aixala's attorney, then as a practiced trial lawyer you know that Persky's knowledge is attributable to Aixala, do you not?

MR. SHAW: Objection, your Honor.

THE COURT: Where are you going with this question?

MR. MANDEL: I am going to the -- give me two more questions, your Honor.

MR. SHAW: This is a fundamental issue in this case. I object to that as a statement of law. It has no relationship at all to any of the inconsistencies between the deposition taken in '75 and the affidavit executed many, many years before that.

THE COURT: I do not see it, Mr. Mandel. I will sustain the objection.

Q In making your summary judgment motion, saying this is all Aixala knew about the matter, did you assume that Mr. Persky held back from Aixala all the surrounding facts about the impending litigation and the position of Gross, Bleich and Donohue that the deal could not be made and that the deal was a fraud on them; did you make that assumption?

MR. GRUTMAN: Objection as to the whole question.

MR. SHAW: I object, your Honor, upon the ground that his state of mind after the complaint was filed is not binding on anybody, is not relevant.

TEH COURT: I see what Mr. Mandel is shooting for. The question is badly phrased, however. That is whether or not in preparing this Mr. Roth -- I suppose you would have to lay a foundation at this point that he knew what your position was, among other things, at that time.

Q Now, when you prepared the 9-G statement and the affidavit there was no doubt in your mind that Persky knew before February 11th these various things you mentioned in your next to last answer, that Bleich and Donohue claimed the deal couldnot be made without their signature and that litigation impended and that the transfer agreement was

illegal.

A I knew that Gross had objected and I knew that that was the fact. Bleich and Donohue, my recollection is, had switched their position back and forth. But I did certainly know, when I drew the summary judgment motion on behalf of Mr. Aixala, I certainly did know that Mr. Gross had raised objection prior to February 11th to the transfer agreement going through without his consent.

Q Didn't you know that Bleich and Donohue raised that objection?

A I knew they were not signatories to the agreement. My recollection was, of what I knew at that time, is that they flipped-flopped back and forth, or one of them.

Q Didn't you know that neither of them signed in the end and in this litigation they were claiming that the transfer was illegal?

A Yes, I was aware of that. Certainly aware of that when I prepared the Aixala affidavit.

Q You were aware that Persky was on Notice of those facts too, were you not?

A Yes.

Q And you were aware that Aixala was Persky's client before February 11th, right?

A I'm not sure whether it was acting pursuant to a power of attorney. I did know --

THE COURT: A question of whether it was his client.

THE WITNESS: I'm not certain whether I knew that as of June.

THE COURT: When you prepared the affidavit. Doesn't it say when he became his lawyer in the affidavit?

THE WITNESS: It may well but I don't have an absolute memory of the contents of the affidavit.

THE COURT: What Mr. Mandel is getting at is at that time you had facts indicating when Mr. Aixala became the client of Mr. Persky and therefore your office; is that right?

THE WITNESS: Our office may have but I'm not sure whether I had that.

THE COURT: If you prepared the draft and you put in there a certain date for his becoming a client, obviously at that point --

THE WITNESS: Did I do that, Mr. Mandel?

MR. MANDEL: No. I don't think that's right.

THE COURT: All right.

Q You knew that Persky actually signed for Aixala?

A That was my understanding, sir.

Q And did you think it was relevant to find out or did you find out whether before exercising that power of attorney and signing for Aixala and getting him into this deal, Persky told him about all of these impending problems and litigations?

A I'm not sure just what my thought process was. I know I asked what the facts were and the facts as I had been told them came forth in that affiavit that I prepared and sent down to Mr. Aixala for signature.

Q Is it your understanding that Persky never said a word to Aixala about the trouble he was getting into; is that what you say your understanding was?

MR. GRUTMAN: I object to that.

THE COURT: Sustained.

Q What was your understanding as to whether Persky had informed Aixala about the details of the deal he was signing for him?

MR. SHAW: Objection, your Honor. How is that binding?

THE COURT: Overruled.

A My understanding was that Aixala basically relied upon Mr. Persky and that it was Mr. Persky who made the decision. He didn't say, Mr. Aixala, do you want me to negotiate this way, do you want this or that? Basically,

that Mr. Aixala reposed a trust in Mr. Persky and Mr. Persky suggested to him at a certain point in time this is the transaction, I'm going to sign for you. That is the way it was done.

MR. MANDEL: I move to strike.

THE COURT: I will allow it to stand.

Q The one thing you have not answered, Mr. Roth, is this:

When you said Aixala knew nothing of these matters and had nothing to do with it, had you inquired of Persky in fact, was it in fact true that Persky took Aixala into this deal without telling him of the position of Gross and Bleich and Donohue and the impending litigation?

A That was my understanding, Mr. Mandel.

THE COURT: Anything further?

MR. MANDEL: No.

RECROSS EXAMINATION

BY MR. SHAW:

Q Did you learn from Mr. Persky that he in fact learned for the first time that there would be a problem with respect to Gross, Bleich and Donohue shortly prior to February 11, 1971?

A And the answer is I'm not sure of that, Mr. Shaw.

Q Did you learn that prior to February 11, 1971

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"Q Did anybody tell you that there were problems connected with this deal and it might not be able to close even though you were willing to put up your stock?"

MR. SHAW: Is that page 71?

MR. MANDEL: Yes. Line 25.

"A Yes.

"Q Who told you that?

"A Persky.

"Q What did he say in that regard?

"A He said it was a matter of getting everything together and not only that, but if I was going to put up the security it had to be something that was fairly, how do you say, not too risky and that he wanted for me to get the best deal possible as to interest or shares or return on my money, et cetera, et cetera, et cetera.

"Q Did he negotiate for you the amount of shares you would get?

"A Yes.

"Q And he negotiated for you the amount of interest you would get?

"A Yes.

"Q He represented you as your attorney in negotiati the deal?

"A Yes."

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"Q Did you ever attend a meeting or more than one meeting between yourself, Mr. Risher and Mr. Muh and Mr. Persky?

"A Never.

"Q Never? Did Mr. Persky inform you that when he was representing you he was also representing the proposed new corporation?

"Mr. Shaw: May I have the time?

"Q This is prior, at any time prior to the date on which the transaction closed on February 11, 1971.

"A No, I don't believe so.

"Q Prior to February 11, 1971, did you know that Mr. Persky was representing the proposed new corporation as well as yourself?

"A I didn't know that.

"Q Prior to February 11, 1971, did you know that Mr. Persky was representing Mr. Risher as well as yourself?

"A No, I didn't.

"Q Prior to February 11, 1971 did you know that Mr. Persky was representing Mr. Kayne as well as yourself?

"A No, I did not.

"Q Prior to February 11, 1971, did you know that Mr. Persky was representing Mr. Muh?

"A No.

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"Q Prior to February 11, 1971, did you know that Mr. Persky represented the Newburger, Loeb partnership?

"A No.

"Q Are you sure of that?

"A Yes."

That was page 80, line 18.

103, line 4:

"Q Did you discuss this view with Mr. Kaplan?

"A Yes.

"Q When?

"A From the beginning.

"Q Will you tell me, if you can, the first time you discussed the proposed deal with Mr. Kaplan?

"A October of November of 1970.

"Q Were you alone when you discussed it or was someone else present?

"A Someone else present.

"Q Who else was present?

"A Persky.

"Q What was the nature of that conversation?

"A The same thing, about investing in a brokerage firm and I would be willing, if the risk was minimal.

"Q What did Mr. Kaplan say?

"A This he believed that if the risk were minimal,

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it was a good deal for him."

Would you agree it should be me? It was a reporter's error.

MR. SHAW: Yes.

MR. MANDEL:

"Q Did you discuss it with Mr. Kaplan again at a later date?

"A Occasionally we might have.

"Q Do you recall any such conversations?

"A Exactly, no.

"Q Approximately?

"A Not necessarily. Sometimes Persky might have talked to Kaplan and he would say the deal is going along fine or not or trying to get the most he can for you, something like that.

"Q Did you ever say to Kaplan, or every say to you, that maybe you should find out what interest you were getting and how much stock you were getting before you agreed to make the deal?

"A No."

I stopped at 104, line 13. I am going to 105, line 18:

"Q You say you subsequently added an additional 3,000 shares of Bacardi stock. When was that done?

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"A I am not sure if it was 3,000.

"Q Yes?

"A I would guess that would be March, April or May of '71.

"Q Where did you get those shares from?

"A Coral Gables National Bank.

"Q They had been pledged for something then?

"A Yes.

"Q Were they pledged for a loan of yours or your wife's?

"A A loan of mine.

"Q When the stock was released, it was released directly to you; is that correct?

"A Yes.

"Q And was it the understanding that when the additional shares were released to you they would also be put in Newburger, Loeb & Company?

"A Yes, because I was paying interest on a loan from Greene, Ted Greene."

May we stipulate that is your partner, Mr. Greene, Mr. Grutman?

MR. GRUTMAN: Yes.

MR. MANDEL:

"Q What was the loan from Greene?

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"A The difference between the shares that I had and the necessary amount that had to go into Newburger, Loeb.

"Q You lent thatmoney?

"A I did not.

"Q What did you do?

"A No. I gave X number of shares. My guess now is 5,000, representing 5500, 6,000. I don't know the amount of shares, the amount of money. The difference between those shares and whatever had to go into was the agreement with Newburger, Loeb was given by a lawyer in Fi..ey, Kumble named Greene as a loan, and I was paying interest to him.

"Q He put in cash on your behalf?

"A I don't think it was cash. I think it was some kind of security or bond or something. I am not sure if it was cash.

"Q Were papers prepared in connection with that?

"A I don't recall.

"Q When was that arranged, before or after the closing on February 11th?

"A It must have been before because I didn't have the shares.

"Q Whom did you discuss that with?

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"A Persky discussed it.

"Q With you?

"A I told him I didn't have the exact -- the necessa amount of shares. Those shares were pledged on a loan. Until I satisfied the loan I only had X number of shares.

"He said he would get the money from someone.

"Q Did he tell you you would have to pay interest on the money?

"A Yes.

"Q Did he tell you how much?

"A No.

"Q Did you sign papers with regard to that loan before February 11th or after February 11th?

"A I don't recall ever signing any papers. I don't know whether I did before or after.

"Q What is your best estimate of the amount of that loan Mr. Greene made to you ?

"A My guess would be at least 100,000.

"Q And maybe 300,000?

"A Yes.

"Q Did you make any interest payments?

"A Yes.

"Q Do you have any records concerning that?

"A I must have some cancelled checks to Mr. Greene

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and to Persky because my cash flow at that time, I didn't have the money, and Persky advanced it and I paid Persky afterwards.

"Q You didn't tell us about those discussions when I questioned you before, did you?

"A You did not ask me.

"Q Well, I asked you about all your discussions with Persky concerning this deal but let us not argue about it.

"A I'm sorry if I didn't. I'm sorry if I did not understand."

MR. GRUTMAN: Would you state that that is the end of the morning session?

MR. MANDEL: So stipulated.

JUROR NO. 2: Did he have trouble with the language?

MR. SHAW: I think we can stipulate that Mr. Aixala comes from Cuba and English is not his language.

JUROR NO. 2: It sounded like it.

MR. MANDEL: I will stipulate that he comes from Cuba, he has a very slight accent.

MR GRUTMAN: He will be here and you can hear him in person.

THE COURT: There was no question raised on the

NEWBURGER, LOEB & COMPANY

v.

CHARLES GROSS, MABEL BLEICH and GROSS & COMPANY

71 Civ. 685

and

NEWBURGER, LOEB & COMPANY, et al

July 11, 1975
10:00 A.M.

Trial Resumed

(In open court - jury present)

THE COURT: Mr. Mandel, please.

MR. MANDEL: Yes, your Honor.

H O W A R D P . B U R A K , called as a witness on behalf of the plaintiffs, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MANDEL:

Q Mr. Burak, are you a member of the Bar of this state?

A Yes, I am, sir.

Q How long have you been such?

A Since 1958.

Q Are you a member of a law firm in this city?

A Yes, sir.

Q What is the name of that firm?

A Rosenman, Colin, Kay, Petschek, Freund & Emil.

Q How long have you been a member of that law firm?

A 1969.

Q How many lawyers are there in that firm?

A I think over one hundred at this time. I'm not sure exactly.

Q Now, do you have a specialty in the kind of work that you personally do within the firm?

A Yes, I do corporate work primarily.

Q And you are here today in response to a subpoena, is that correct?

A That is correct.

Q I direct your attention to the period towards the end of 1969 and through the first two months of February of 1970 -- excuse me. The period through the end of 1970 and through the first few months of 1971, and ask you whether you were involved in any way in connection with negotiations leading to a transfer of the assets of the Newburger, Loeb partnership to a new corporation.

A I personally was involved in early of '71, if

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that was the year. I was not involved in the latter pater of the prior year. My firm was but I got involved in this, I'd say, in January.

Q Do you recall that a preliminary agreement was signed on or about December 31, 1970?

A Yes, sir.

Q And were you involved before the creation of the preliminary agreement?

A No, I was not.

Q You became personally involved after that moment?

MR. SHAW: Objection to the use of the word "personally". He testified he became involved in January 1971.

THE COURT: Overruled. I will permit it.

A That's correct, sir.

Q Now, what clients did you and your firm represent?

A We represented the partnership, Newburger, Loeb & Co., and I believe some of the individual partners, such as Andrew Newburger.

Q Who else?

A I think his wife had an interest, Shirley Newburger. We were acting, I would say primarily, as

special counsel for the partnership in connection with the reorganization into a corporation.

Q Who was acting on behalf of the corporation in those negotiations?

A I don't remember the full name of the firm. It is Finley, Kumble something or other. It was primarily Robert Persky.

Q And do you know whether Mr. Persky was representing the Newburger, Loeb partnership in any matters at that time other than the negotiations for the transfer agreement?

A Well, I think the Finley, Kumble law firm had been doing some work for the partnership but not in connection with this transaction.

Q In this transaction you were to represent the partnership?

A That is correct.

Q And the Finley, Kumble firm was representing the new corporation; is that correct?

A That is correct.

Q And the new corporation under this negotiation was to buy the assets of the partnership; is that correct?

A Yes.

Q And the partnership for its part was going to

give up its assets and receive something in return?

MR. BIEHL: Objection, your Honor, as to leading.

THE COURT: Well, this, it seems to me, is laying a foundation for this. We have had a lot of testimony about this already, so this is nothing new.

MR. BIEHL: He is not posing questions to the witness in the proper form.

THE COURT: I know, but this is merely cumulative and I would not have taken it at any great length in any event.

Overruled, go ahead.

MR. MANDEL: Let me point this out, your Honor: This witness represents adverse parties to my client in this litigation.

THE COURT: You may proceed, Mr. Mandel.

Q Now, you are aware, are you not, that in this litigation I represent Charles Gross, Mabel Bleich and Gross & Company and Jeanne Donohue?

A That is my understanding.

Q And that your client or former clients, the partnership of Newburger, Loeb and Andrew Newburger, are persons against whom my clients are asserting claims in this proceeding?

MR. SHAW: Objection to form, your Honor. Former clients I don't think there is any question. Whether they are presently the clients of this witness is a question.

THE COURT: I do not think that was the question.

MR. SHAW: He said your clients or former clients.

MR. MANDEL: The witness can answer.

THE COURT: Overruled.

Distinguish, if you will.

A I don't believe we are doing any work for them at this point.

Q But they were your clients?

A They were our clients at the time of the transaction.

Q All right.

Now, do you recall, Mr. Burak, that in the preliminary agreement there was a provision stating that at the closing, in words or effect, the attorneys for the partnership would deliver an opinion letter to the effect that the transaction was regularly authorized under the law by the partnership?

A There was a provision, Mr. Mandel. I can't tell you precisely what it said but it was in substance as

you have indicated.

Q And under that provision of the preliminary agreement it would have been your firm that was contemplated to render the opinion that the agreement was properly executed on behalf of the partnership?

A Yes, that is correct.

Q Now, did there come a time when you authorized or directed research to be done by your firm with regard to the requirements of consent on behalf of various members of the partnership in order to properly authorize the proposed transaction?

MR. SHAW: Objection to this and anything further your Honor, upon grounds that I would like to state at the side bar.

THE COURT: All that.

(At the side bar)

MR. SHAW: I believe that this question --

MR. MANDEL: Excuse me one second. I can't hear a word.

MR. SHAW: I believe this question and any further questions are barred from inquiry upon the ground of attorney-client privilege. Newburger, Loeb Corporation as the assignee of the assets and liabilities of the partnership asserts that privilege. In addition I believe that the

attorneys for the partnerhsip assert the privilege as well.

MR. MOSS: The attorney for the general partners objects to this on the grounds of privilege.

MR. MANDEL: This has been gone into thoroughly

THE COURT: How is this a communication that is protected by the attorney - client privilege?

MR. SHAW: It is related to the two communications. It relates to what the attorney does, his process of thinking, his research, not just --

MR. MANDEL: Well --

MR. SHAW: Please. I'm in the middle of a sentence.

The attorney-client privilege does not just cover communication. It covers things related to communication as well. Certainly where an attorney does research and has an opinion and does certain things in the scope of his retainer, all of that, and I think this is quite fundamental, is covered by the attorney-client privilege.

It is an invasion of that privilege, that relationship for an attorney to be asked questions with respect to his mental processes, his research, his opinion, anything involved in that.

THE COURT: Let me ask another question.

Was this the subject of any deposition testimony

on Mr. Burak's part?

MR. MANDEL: Yes.

THE COURT: Did he testify he did this research?

MR. MANDEL: Yes.

THE COURT: Then there was a waiver, it seems to me, at that point.

MR. MANDEL: Not quite.

MR. GRUTMAN: All objections are reserved.

MR. MANDEL: They still won't let me tell you what this is about, your Honor.

THE COURT: Go ahead.

MR. MANDEL: My clients, Gross and Donohue, were partners. The partnership law says every partner is entitled to all information about the partnership law. Therefore, there cannot be confidential communications of the partnership attorney from them.

For two years they held me off. We had formal motions before Magistrate Goettel. Magistrate Goettel, after taking my brief and Finley, Kumble's brief, came out with a ruling saying that because my clients were partners of the partnership, no rule of confidentiality could exist against them.

There is a formal opinion that was not protested to you. After that I got the information and it is in the

depositions, and the opinion of the Magistrate is clearly correct as a matter of law.

MR. GRUTMAN: May I be heard on this because this really touches Finley, Kumble.

All objections were reserved for the trial, so I think --

THE COURT: Yes, I have to pass on this de novo.

MR. GRUTMAN: There is a much more fundamental question. What Mr. Mandel is approaching is a research study that was done at the Rosenman firm. I'm certain that Mr. Mandel will not deny that the research memorandum, which was produced at the deposition, was at the operative time in January and February, never supplied to Finley, Kumble or to anybody else.

Accordingly, your Honor, we believe that we are not bound by that memorandum and it is not admissible as against us.

THE COURT: Do you have Judge Goettel's report?

MR. ROTHMAN: I don't believe so.

MR. SHAW: I will get it.

MR. ROTHMAN: We can get it in the file room.

THE COURT: You don't have a pleading file here where you have his opinion?

MR. GRUTMAN: I don't have that available. But, Judge, do you get the point I am getting at? Here is a memorandum which is prepared by the Rosenman firm. It is not supplied to anybody.

Now, Mr. Mandel proposes to put that in evidence on the good faith issue as to a document that we never saw.

MR. MANDEL: One moment, please. The document is certainly admissible as against the partnership which was represented by Mr. Burak and against the partners who knew about it. All of them knew about it by imputation, but Andrew Newburger specifically in his depositions says he was told of the Rosenman belief.

At the closing,we are going to have this man's testimony, and I don't mind a ruling that is subject to connection. The document itself is not admissible against Finley, Kumble. But if there is a conspiracy here between the partners and Persky and the promoters of the new corporation and the corporation, what is known to one is known to all.

MR. SHAW: May I make a brief statement, Judge?

THE COURT: Yes.

MR. SHAW: I think the facts are that at the time, January 1971, when this was done Bleich and Donohue

and Gross were represented by different attorneys, not by this attorney.

MR. GRUTMAN: They were partners.

MR. SHAW: They were partners but represented by a different attorney. I think it is specious to argue that is no privilege because they are in essence the client and they can behave the privilege.

MR. GRUTMAN: Partners in withdrawal, all of them.

THE COURT: I have a substantial question. There is any privilege to start with because privilege attaches to condifential communications between an attorney and client. Nobody is presenting to me any authority that says that something that is not a communication between a client and attorney becomes privileged because it is something that an attorney does in the course of research.

If somebody gives me such a decision I might be inclined to consider it. I do not see this is a communication.

MR. GRUTMAN: The attorneys' work product in the service of a confidential opinion to be rendered to a client may make the privilege prevailable.

THE COURT: Did Magistrate Geottel allow this?

MR. GRUTMAN: I don't know that.

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MR. MANDEL: You know he did.

THE COURT: Let me establish what the fact is.

Magistrate Goettel rules that this was not within the privilege and directed that the deposition questions be answered; am I correct about that?

MR. MANDEL: Yes.

MR. GRUTMAN: I can't say no to that. I can't say one way or another.

THE COURT: That was not appealed to me for reversal on any ground, am I correct?

MR. GRUTMAN: That I think is correct although I'm not prepared to say it was.

THE COURT: Unless you tell me to the contrary, I am going to permit this man to answer.

MR. GRUTMAN: Judge, no one urged that Gross was a withdrawn partner or a general partner in withdrawal and that Bleich and Donohue likewise were limited partners in withdrawal.

MR. MANDEL: Everything was urged.

MR. GRUTMAN: Manners, please. And that each of them were represented by separate counsel.

Now, as to what he did --

THE COURT: Will somebody pull for me Magistrate Goettel's report. I think it is ridiculous for you to be

talking about something and nobody has this report. This has been ruled on and nobody appealed to me as a pre-trial matter, somebody ought to show me this thing.

MR. GRUTMAN: We had no pre-trial, Judge.

THE COURT: When was this argued before Magistrat Goettel?

MR. MANDEL: I think he made this decision a year ago.

MR. SHAW: Well before I came into the case.

THE COURT: Was I on the bench at that point? Was the case in any jurisdiction?

MR. GRUTMAN: Yes, your Honor. The real question is the memorandum,not whether he had a research project. That is the question on which Magistrate Goettel I'm sure has not opinioned.

THE COURT: Mrs. Bjork, are you familiar with that?

MR. MANDEL: It was two years before I could get this information.

MR. GRUTMAN: Who cares how long it took.

MR. MANDEL: This is the right one, your Honor.

MR. GRUTMAN: I have not read it yet, your Honor.

THE COURT: I have not either.

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(Pause)

THE COURT: Overrule the objection.

MR. GRUTMAN: What about the introduction of the document, Judge? He has a research memorandum that he does not supply to Finley, Kumble.

THE COURT: I think that is admissible on another ground, that is Mr. Persky said there is a Supreme Court in Kings County that supported his view and Mr. Mandel is asserting that his view is frankly without legal support.

One of the issues is the good faith of that view.

MR. GRUTMAN: The document is what I am talking about. His opinion is all right.

THE COURT: The document contains his opinion. It is a written form of his opinion.

MR. GRUTMAN: It is not.

THE COURT: Let me look at it.

MR. SHAW: Would you be willing to let me ask a few questions on voir dire to establish the existence or non-existence of privilege?

THE COURT: No. I rule there is no privilege.

(In open court)

THE COURT: Objection overruled.

MR. GRUTMAN: May I have a continuing objection?

THE COURT: Yes.

(Question read)

A Yes, I did.

Q Did a memorandum eventuate in connection with that?

A Yes. One of my associates prepared a memorandum covering that point.

Q Please produce the document.

A I have it, Mr. Mandel.

Q It is Exhibit 97 for identification.

THE COURT: Do you offer this in evidence?

MR. MANDEL: Yes.

THE COURT: I will look at it.

Have you gentlemen seen this?

MR. GRUTMAN: I would like to see it.

THE COURT: Do you have a copy?

MR. GRUTMAN: No.

THE COURT: Do you have a copy you can give them, Mr. Mandel, so I am looking?

THE WITNESS: I know copies were made when I was deposed.

THE COURT: Show that copy to your adversary.

This point was covered in Point 3. You will

see also there were three questions.

THE COURT: You offer the entire memorandum?

MR. MANDEL: Yes.

THE COURT: This is TTT for identification.

MR. SHAW: Although I have consistently furnished Mr. Mandel in advance with exhibits, sometimes a day or two days beforehand, this practice has not been followed whatsoever --

THE COURT: Mr. Shaw, please. I do not want an interjection of this kind. That raises an issue and then Mr. Mandel will say I did show you some and we will [illegible] into argument. I do not need it. It does not bear on the ruling on this exhibit.

You look at it; I will look at it; we will have a ruling.

I would assume since this was marked Exhibit 97 on a deposition in 1974, that everybody had a copy in advance and had seen it anyway.

MR. SHAW: That assumption is not correct in my case, your Honor.

THE COURT: That is then a problem you could have solved by asking somebody to give you a copy of 97 on the deposition.

(Pause)

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THE COURT: Are you interested in more of this TTT for identification than deals with Point 3?

MR. MANDEL: I think not, your Honor. If there is no objection I would prefer to put the whole thing in but I would not make an issue if anybody objected to the other points. I think the rest of it could be helpful and informative but it is not worth fighting about.

MR. GRUTMAN: Where does Point 3 begin?

(Pause)

THE COURT: Mr. Mandel, with regard to Point 3, I think at this time appropriate for you to have a better foundation from Mr. Burak as to his participation in the making of this, what position he took with regard to the substance of it. I am talking only about Point 3 of this memorandum. Then I will reconsider your offer.

At this point I sustain the objection.

Q Mr. Burak, did you read this Exhibit, TTT, after it was produced for you?

A Yes.

THE COURT: Did you participate in the making of it at all?

THE WITNESS: I had discussions with my associate, William Freedman, sir, and he did the underlying research and then we would discuss it. We probably discussed this

before he even put it to paper, and then he put it to paper and we discussed it again. But the underlying research, sir, was done by the associate.

Q Now, did the opinion and conclusion expressed on Point 3 represent your own conclusion and opinion with regard to the matter?

A Absolutely. I mean we felt that this was the position of our firm on that matter.

THE COURT: You offer it?

MR. MANDEL: Yes.

THE COURT: Any objection?

MR. SHAW: Yes, your Honor, but on the grounds previously stated.

THE COURT: It is received as to Point 3.

MR. GRUTMAN: No, we want it all in.

THE COURT: All right. Mr. Mandel was willing to have it all in.

MR. GRUTMAN: We would be delighted to have it all in, not waiving our objection as to the admissibility of anything.

THE COURT: Mr. Mandel is offering Point 3. You object to 3, but if I overrule you on 3 you want it all. You shall have it all.

MR. MANDEL: Mr. Grutman said something more than

that.

MR. GRUTMAN: I object to the introduction of this document for reasons stated at the side bar. Since your Honor has determined that the document is to be admissible, without waiving my objections as to the admissibility I want it all to come in if any part of it should be admitted by you, without consenting that any part of it should come in at all as against us.

THE COURT: I am ruling that Part 3 is admissible over your objection. You are saying if I admit that you wish it all?

MR. GRUTMAN: Without relinquishing the legal position that none of it should come in.

THE COURT: I am not clear on what is happening. I am ruling on 3. If you are offering the balance, that is your offer.

MR. SHAW: Then, your Honor, I would like to object to Part 3 upon the ground of completeness.

MR. GRUTMAN: That is the reason I say what I say.

THE COURT: I am only admitting Part 3 as being relevant to the issues that are on trial in this case.

MR. GRUTMAN: Yes, sir.

THE COURT: The balance is excluded.

Let me see that exhibit a moment, please.

MR. MANDEL: May I have back at least one of my extra copies?

THE COURT: Let's have the one that is marked.

I am excluding the numbered paragraphs 1 and 2 under the word "Issues". I am excluding beginning with the Arabic 1 under "Discussion"; so much of the exhibit to Arabic 3 on page 8. The balance of the exhibit is in evidence.

(Defendants' Exhibit TTT received in evidence)

MR. GRUTMAN: I take it the position I have advocated on behalf of Finley, Kumble, this document not being supplied to us before the closing, is not binding on Finley, Kumble.

THE COURT: At this point, it is taken subject to connection, that is true.

MR. SHAW: I object on behalf of Aixala and Risher, your Honor.

THE COURT: I rule similarly. It is admissible against the partnership.

MR. GRUTMAN: Would your Honor because of the argument at the side bar indicate to the jury what the

admissibility of this document is and the limitation you have placed on that at the present.

THE COURT: I will consider a charge on that if you want to split it.

MR. GRUTMAN: Yes.

MR. BIEHL: We object on behalf of Muh, Kayne and Sloane, your Honor.

THE COURT: If it is connected to them, it is. If it is not, it will not be admitted against them.

MR. MANDEL: I would like to read this to the jury.

(Counsel reads from Exhibit TTT in evidence to the jury)

BY MR. MANDEL:

Q Now, Mr. Burak, did you at any time make known your conclusion expressed in TTT, namely that the written consent of all limited partners was necessary to authorize the transaction to your client, the partnership?

MR. SHAW: Objection to form.

MR. GRUTMAN: Objection.

MR. ESTERMAN: Objection.

THE COURT: What is the basis for the objection?

MR. SHAW: The form, I think, your Honor, is leading and it is unduly complicated, as well as my

previous objection, which I have a continuing objection for. I think this is leading.

THE COURT: Overruled.

MR. GRUTMAN: The form of the question embraces everything Mr. Mandel read to Mr. Burak which was prepared by his young associate. It embraces all of that as to all of that had been communicated to us when the fact is we never got this memorandum before the closing.

THE COURT: As I remember the question it was whether he communicated the conclusion that all the signatures were required.

MR. SHAW: I think it is broader than that.

THE COURT: Let us read it back.

(Pause)

THE COURT: The objection is overruled. You may answer it.

A The answer is yes.

Q When did you make the communication and how?

A At the time that we were discussing this, and I forget the date of the memorandum.

Q January 25th.

A We were having daily discussions and we discussed this with Andrew Newburger. And as I said on my deposition, we may have discussed this with others as well. I can't

recall specifically. I do recall specifically discussing this with Andrew Newburger.

MR. GRUTMAN: Object and move to strike everything that follows the speculation that he may have discussed it with others. That is not testimony.

THE COURT: Strike it.

MR. MOSS: I object to his communication to Andrew Newburger on the ground of attorney-client privilege.

MR. MANDEL: Your Honor, this gentleman represented the partnership. My clients were partners --

MR. MOSS: Objection, your Honor.

THE COURT: I overrule the objection.

MR. GRUTMAN: You sustained mine or overruled mine, your Honor?

THE COURT: I sustained yours and overruled this gentleman over here.

Sir, I don't believe I have been introduced to you.

MR. MOSS: Mr. Moss, Richenthal, Abrams & Moss.

THE COURT: Thank you, sir.

MR. MANDEL: Do you think we should state on the record that Mr. Moss represents the partners who are additional defendants?

MR. MOSS: The general partners.

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THE COURT: Very good.

Q Now, was Andrew Newburger a general partner of Newburger, Loeb & Company at the time you gave him this information?

A Yes.

MR. MOSS: May I have a continuing objection to all these questions?

THE COURT: No, because this has to do with a matter of fact, having nothing to do with the communication. Overruled. You may not.

Go ahead, you may answer.

A Yes, he was.

Q What did Andrew Newburger say to you, if you recall?

MR. SHAW: Objection.

MR. MOSS: I object.

THE COURT: May I have that Magistrate Goettel memorandum, please?

(Pause)

THE COURT: I am going to overrule that objection on the basis of Garner, 410 Fed. 193 and for other reasons set forth in the memorandum of Magistrate Goettel.

You may answer.

A I don't recall, sir.

Q Did there come a time when you informed Mr. Persky of your conclusion?

A Yes, sir.

Q When did that time come?

A The same time this memorandum was prepared we were having discussions with Mr. Persky, with Mr. Bamberger and I believe they had another attorney in their office. I don't remember his name

Q And do you recall what you said to Mr. Persky?

A I can only give you the general -- I can't recall specifics after all these years. It was basically the substance of the legal research. We gave them either the cites or a copy of the memorandum, one of them and I don't remember which, and we had further discussions --

Q By cites you mean the citations?

A Citations to the cases. We had further discussions, and I don't remember the sequence now. We were told they had sent some boy over to the City Bar Library and had spent the day doing some research and that they did not think there was any problem with this.

We said to get in touch with Bill Freedman, our associate. If we missed any cases we would like to know about them, and we did not hear from them.

Q Did you inform Mr. Persky at that time that you

would not --

MR. SHAW: Objection.

THE COURT: Sustained as to leading.

What did you say?

THE WITNESS: We told Mr. Persky --

MR. SHAW: Objection. No question outstanding.

THE COURT: What did you say to Mr. Persky?

THE WITNESS: That we had done this legal research and we concluded that the consent of the limited partners would be necessary.

In view of that we would have trouble giving an opinion. Words to that effect. I can't give you obviously the precise words after four and a half, five years, whatever it was but that was the substance of it.

Q When you say trouble giving an opinion, you mean trouble giving --

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

THE COURT: Sustained. It is just a question of what the conversation was between them.

Q At the time you had this conversation with Mr. Persky, were you aware that Mabel Bleich and Jeanne Donohue would not or might not sign the proposed agreement?

A What were the names now?

Q Mabel Bleich and Jeanne Donohue.

A There were a few people other than Mr. Gross. Now, I believe those are the names. I'm not certain of them.

Q Now, after you had this conversation with Mr. Persky on or about the 25th of January, did work go forward in connection with the proposed transfer agreement?

A Yes, sir.

Q Now --

A Let me just state, Mr. Mandel, I have said that it wasat about the time of the memorandum that we had this discussion. There was a follow-up talk, as I said, when they had indicated they had sent some boy over the the library and we told them to get in touch with us. So there was more than one discussion.

MR. GRUTMAN: I object to the disparagement of boy going in the library. We don't employ boys in the library.

THE WITNESS: I am sorry.

Q Was that what you were told?

A That's what I was told.

An attorney from your office, I apologize.

MR. GRUTMAN: Just like Mr. Freedman.

MR. MANDEL: There is no occasion to interrupt

the flow of this testimony.

THE COURT: Proceed.

Q Now, drafting continued between the date of that conversation and February 11th, did it not?

A Yes,sir.

Q And drafts were coming and revisions were coming back and forth between you and the Persky firm; is that correct?

A That is correct.

Q And I ask you now to produce 111 for identification. I ask you to turn to page 8.

A Yes.

Q Now, what is the document -- I suppose I had better have it marked now.

THE COURT: This is 111 on the deposition?

MR. MANDEL: Yes.

THE COURT: It will now be marked UUU for identification.

(Defendants' Exhibit UUU marked for identification)

Q What is UUU for identification?

A This is a draft of the agreement of transfer.

Q And does it contain handwritten notes and changes on it?

A Yes, sir.

Q Whose writing are the changes in?

A Well, in page 8 they are mine.

Q Now, I specifically direct your attention to Paragraph H on page 8. Do you see that?

A Yes, sir.

Q And do you see that you made some changes on that?

A Yes, I do.

Q And will you explain what change you made?

A The change in paragraph --

MR. GRUTMAN: I object. This is a draft. I don't know that this document is in evidence.

MR. MANDEL: I offer it.

MR. GRUTMAN: I object to it. These are his jottings. They are not binding on us.

THE COURT: Let's find out whether they are or not.

Do you offer it in evidence?

MR. MANDEL: Yes.

THE COURT: What is the foundation for it? We have not heard about where it came from, what was involved in it.

MR. MANDEL: All right, your Honor.

Q Where did this draft, UUU, come from?

A It was in our files.

Q Before that, where did it come from? Who prepared it in the first instance?

A I believe Mr. Persky's firm did.

Q And the changes on page 8, do they indicate revisions which you wished to make?

A Yes, H is a revision, yes.

Q And what changed --

MR. GRUTMAN: It is a proposed revision in the hand of this witness so I am told.

THE COURT: This exhibit is not yet in evidence.

MR. GRUTMAN: Correct. The exhibit itself in final form is in evidence.

THE COURT: I appreciate that.

MR. SHAW: I would assume he is going to offer it only in relation to the persons he represented, your Honor.

THE COURT: I do not know, Mr. Shaw. Let's not anticipate anything.

Mr. Burak, without getting into what they are, did you communicate these handwritten proposed changes to anybody in paragraph H on page 8?

THE WITNESS: Your Honor, the best way I could

answer that is that the daily discussions and sessions were going on primarily with Mr. Bamberger of the Finley, Kumble firm and we may have had a session working together where we mutually came up with these changes. There may have been changes which were made by me in my office and then communicated with him or there may have been changes which he made and which he communicated to me. I really can't say at this point after so many years.

THE COURT: What is your best recollection as to the fact of communication? Was there communication in one way or another?

THE WITNESS: In one way or another, definitely, your Honor, because we were working together on this.

THE COURT: Do you offer it?

MR. MANDEL: I offer it.

THE COURT: To the extent of what, Paragraph H?

MR. GRUTMAN: Your Honor, what is this being offered for? There is a final form.

THE COURT: I think I understand what it is being offered for.

MR. GRUTMAN: That is why I ask; I don't.

THE COURT: It is being offered to show the communication to the Finley, Kumble firm of the Rosenman opinion that this required authorization by everybody.

MR. MANDEL: By the signature of every limited partner.

THE COURT: It is being offered for that purpose.

MR. GRUTMAN: I don't believe that is established

MR. SHAW: It might be something they wanted but not necessarily they felt was necessary.

THE COURT: That is their position.

MR. SHAW: That has not been established.

MR. MANDEL: The inference may be drawn clearly.

MR. GRUTMAN: The witness has just said --

THE COURT: Objection is overruled. We discussed this on a prior occasion here.

MR. GRUTMAN: I don't believe we did, Judge. This document was never presented to you.

THE COURT: The subject matter here of the interchange between the Rosenman firm and the Finley, Kumble firm on this subject has been the subject of prior discussion even back with earlier witnesses, what was said by Mr. Burak at a particular meeting Mr. Steefel testified. I remember he knew him, as a young man, as opposed to a boy.

MR. SHAW: I repeat the objection made previously and also the objection on lack of connection.

THE COURT: It will be taken subject to

connection as against those with whom it is not specifically tied in at this point.

(Defendants' Exhibit UUU received in evidence)

THE COURT: With respect to Paragraph H which identifies what it is.

MR. MANDEL: Has the original been marked?

THE CLERK: Yes.

Q Mr. Burak, at Paragraph H as it came to you in the Finley, Kumble draft read as follows, did it not -- your Honor, I am afraid that we have to go back a little further to identify this as a representation or warranty. In other words, Paragraph H standing alone --

MR. GRUTMAN: It is a condition precedent to transferees obligations.

MR. MANDEL: Paragraph H must be oriented as part of 6.

MR. GRUTMAN: Would you agree I have read it correctly, Mr. Mandel?

THE COURT: In other words, you want in addition the six lines at the top of page 6 in evidence.

MR. MANDEL: Yes.

THE COURT: They are received.

MR. GRUTMAN: Can the jury have those read to

them?

THE COURT: I am sure that is about to happen from what I hear here.

Q Paragraph 6 begins this way, Mr. Burak, in the draft:

"Six, Conditions precedent to transferees obligation. Each and every obligation of transferee to be performed on the closing date or thereafter, as the case may be, shall be subject to the satisfaction prior thereto of the following conditions unless specifically waived in writing by the transferee:"; that's correct, is it not?

A I assume so.

Q One of the conditions contained in Mr. Persky's draft was H on page 18, and as submitted to you H read:

"The transfer of the business, property and assets of the transferor in the manner contemplated by this agreement shall have been duly and validly authorized and approved in accordance with the provisions of the restated articles of limited partnership of the transferor dated February 26, 1970, and transferor shall have delivered to transferee evidence in form satisfactory to transferee's counsel of such authorization and approval and of compliance with any other statutory and regulatory requirements for the valid consumation by transferor and transferee of the

transaction contemplated by this agreement."

Have I read that right in its original form, Mr. Burak?

A Yes, you have.

Q Now, you modified that in your own handwriting by striking out certain provisions; is that correct?

A Well, it is my handwriting and I presume I made the modification.

Q And what you did, and I would like to show this to the jury, if I may, is to change the provision that says:

"The agreement shall have been authorized and approved in accordance with the articles of limited partnership of the transferor," and instead you wanted it only to say that it was authorized and approved by all of the general partners; is that correct, Mr. Burak?

A Yes, sir.

Q And will you state why you wanted to eliminate the proviso that it shall have been authorized and approved in accordance with the restated articles of limited partnership?

A Well, I can onoy answer it this way: That some of the limited partners were not signing.

Q And that, therefore --

A Well, let me put it this way: It was questionable in our mind as to whether or not it was in accordance with the provisions of the partnership if all of the limited partners were not signatories.

MR. SHAW: I assume I have a continuing objection, as other counsel, to that testimony as well.

THE COURT: You do.

Q I now ask you to produce, Mr. Burak -- before we go further with that, did you have any other conversations that you have not told us about yet with Mr. Persky or other representatives of the Finley, Kumble firm concerning your rendering an opinion on behalf of the partnership that the proposed transfer agreement was lawfully and validly authorized?

A Yes. The night before the lcosing we were having another session at the Finley, Kumble office.

Q What date would that be?

A Well, when was the closing?

Q February 11th.

A This would have been the night of February 10th

Q Who was present at the pre-closing session, to the best of your recollection?

A Bamberger, Persky. They had other fellows from their office. I don't remember their names.

Q And what happened then?

A Well, the subject again came up as to the giving of an opinion and Mr. Persky tried to persuade us, let us say, to give such an opinion. Obviously we did not.

Q When you say he tried to persuade you, can you be more specific? In fact he argued with you?

MR. GRUTMAN: He shook his head and I object to the leading.

THE COURT: Strike that.

A I can't recall specifics that go back four and a half years. I can just give you general conversations of what took place.

Q Well, do you recall that on your deposition, Mr. Burak --

MR. GRUTMAN: Page, please.

MR. MANDEL: Yes, I will give it to you.

Q I am going to page 64, line 19. Do you recall that you said, "I want to say it again. I am not trying to be difficult here, Mr. Mandel, but this goes back a long time" --

MR. GRUTMAN: Just a moment. That is an answer. I want the question. I want the question to which the answer may be applicable before I make my objection, if I do.

MR. MANDEL: All right.

Q Page 63, line 20.

THE COURT: When was this deposition?

MR. GRUTMAN: October 24, 1974.

THE COURT: Very good.

Q Page 63, line 20:

"Do you recall whether there was any heat displayed by Mr. Persky in these discussions? Was he indigna in any way?

"Mr. Esterman: I" --

MR. GRUTMAN: I object to the colloquy.

MR. BIEHL: I object as to a time being fixed as to when this questioning took place.

MR. GRUTMAN: Not on the deposition.

MR. MANDEL: Let's go back. We shall have it. Now I am going to page 61

MR. GRUTMAN: All right.

MR. MANDEL: I have to go back even further.

Page 60, line 8.

Q Did I ask you these questions and did you give these answers, Mr. Burak, and I know it is an unfair way to put it when you don't have it before you.

A Go ahead.

Q But you may be able to rely on counsel who are following me diligently if not avidly.

MR. GRUTMAN: Accurately.

THE COURT: Mr. Burak has the original. I have furnished him with it.

Q Page 60, line 8:

"I would like you as well as you can to tell me about the first conversation you had with Persky in which you told him there was a problem about your rendering an opinion.

"A As best I can recall we were talking about a number of subjects. It wasn't a meeting specifically dealing with the opinion but we were working on the various documents and I told him that we were having problems with the opinion and that we had a man in my office who had researched and that we had some cases we were concerned with. I don't know whether we gave him those citations at that time or at a subsequent time but I recall that we did give him some citations of some cases that we had found.

"I think there was a subsequent discussion because my recollection is that Persky had said that they had sent somebody over to the Bar Association and had done a day's research and they didn't have any problems, and that we told him to have his associate get in touch with Bill Freedman of my office because maybe we overlooked something or maybe they could talk it out.

"Bill said that the fellow never called him. But I don't believe that there was anything in depth, any discussions in depth until we got to the night before the closing when we were working practically to well into the morning, if I recall.

"At that point again Persky raised the question of the opinion.

"Q Did he raise that with you?

"A With me.

"Q Who else was present at that time?

"A He had a number of men from his office there. I am sure Bamberger was there because he had done a lot of work on this."

I am skipping some colloquy.

"The Witness: Yes, I am talking about the whole agreement, the whole transaction.

"He had some associates. I think Rosenblum or Rosenbaum or something like that. I can't recall. But he had a few other people working there.

"Q Can you tell me as well as you can the conversation that took place at that time?

"A Well, it was again basically a rehash of what we had told him before, that in the absence ofthe signatures of all of the limited partners we did not feel we could

give him an opinion.

"Q That the agreement was properly authorized?

"A Whatever the opinion was called for there. I don't recall the language, but it was basically to that effect.

"Q Was there a discussion about why you could not give the opinion?

"A We told him at that time that we felt that under the law as we saw it, the cases, the statutes, Article 98, that we felt all of the signatures were required.

"Q Did he argue with you about that?

"A You know I am not sure what you call argument. I think he was trying to persuade us to issue an opinion. He was trying to see if we could issue something that might have some qualification."

MR. GRUTMAN: I must object. Mr. Mandel selectively reads it softly and then he provides these intonations to suit his purposes. He should be instructed to read it straight. "Something" is not in capital letters or underlined. "He was trying to see if we could issue something that might have some qualifications."

THE COURT: Go ahead, Mr. Mandel.

MR. MANDEL: Shall I reread this?

MR. GRUTMAN: Read it straight.

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THE COURT: Go forward, please. Go forward from where you stopped.

MR. MANDEL: All right.

"I would say that he argued but it all depends on what you mean by arguing.

"Q Did he state an opinion of his own? Did he tell you you were wrong about the statute and the cases?

"A I honestly can't say.

"Q Did he tell you you were chicken? I don't mean in direct words, or jeopardizing the deal or anything like that?

"A I really can't say, Mr. Mandel. It has been too long. I know we discussed it. He obviously wanted us to issue the opinion. He tried to persuade us. To the extent you say that is arguing, he argued with us.

"Q Don't use my words, use your own.

"A You know, I am trying to tell you , you know, tothe best recollection I have of something that took place so many years ago.

"Q I understand.

"A I really cannot recall specifics.

"Q Do you recall whether there was any heat displayed by Mr. Persky in these discussions? Was he indignant in any way?"

Then I am skipping colloquy.

"A I want to say again, I am not trying to be difficult here, Mr. Mandel, but this goes back a long time. I believe Persky was angry. I wouldn't call it a pleasant discussion that we had but I cannot give you specifics.

"Q Do you recall Persky saying to you, 'Why didn't you tell me earlier you were going to spring this surprise on me?'

"A No, he would have no basis for saying" --

MR. GRUTMAN: I object to everything after "no.

THE COURT: I will strike out from this answer everything after the word "No." The word "No" may stand.

BY MR. MANDEL:

Q Now, Mr. Burak, did I ask you those questions and did you give those answers?

A Yes, sir, I did.

Q Were those answers truthful?

A To the best of my recollection, yes.

Q Now, we are back away from this to the night before the closing and you had discussions with Mr. Persky; is that correct?

A Yes, sir.

Q And how did those discussions conclude with

regard to whether or not the Rosenman firm would issue an opinion?

MR. SHAW: Objection.

THE COURT: Overruled.

A Well, we concluded that we were not going to change our position.

Q What does that mean?

A We were not going --

MR. SHAW: I think the only thing we are entitled to receive is conversation, what was said.

THE COURT: I assume this was communicated.

Yes, go ahead.

THE WITNESS: Yes, that is correct, your Honor, that we were not going to give an opinion.

Q Do you recall, Mr. Burak, that the question of your opinion came up again the next night on February 11th at the closing?

A Not on the night, Mr. Mandel. It came up during the day at the closing.

Q What happened?

A There was an attorney representing some of the interested parties. I believe his name was Louis, and he was seated fairly close to me at a large conference table that they had at the Finley, Kumble office. I think it was

in the library.

And he said that he wanted to see the opinion. I told him that there would be no such opinion. And either at that point or later on he announced to the group, I think Mr. Persky was heading the conference, that he understood there was not going to be an opinion.

MR. GRUTMAN: I object to what Mr. Lewis said. Hearsay.

THE COURT: To Mr. Lewis in the presence of Mr. Persky? He testified this was in the presence of Mr. Persky who was chairing the meeting.

MR. MANDEL: This was at the closing.

THE COURT: I know. Objection overruled.

MR. SHAW: Subject to connection, your Honor.

Q Please go on with the discussion.

A Well, in any event, he said that he understood that there was not going to be any opinion and that he wanted an explanation.

At that point Mr. Persky said that he had heard for the first time last night that there was not going to be any opinion and that he was going to issue an opinion on behalf of the partnership. I don't recall whether he presented it then or later in the closing but he did present an opinion on behalf of the partnership.

When Persky had finished, I then answered him by saying that his statement was not true and that we had indicated to him a few weeks ago that we were having trouble with an opinion and that quite frankly we did not think we could give an opinion in the absence of the signatures of all of the limited partners.

I don't know whether Mr. Persky produced his opinion then or whether he produced it later, but that was how the subject came up and the discussions that took place at the closing.

Q Now, did the general partners of the Newburger, Loeb firm go ahead and close that transaction?

A The transaction closed, yes.

Q Did you have any discussion with the general partners of the Newburger, Loeb firm concerning the consequences which would flow or might flow from closing the transaction without the signatures of limited partners?

MR. SHAW: Continuing objection.

MR. MOSS: Same objection.

MR. GRUTMAN: Same objection.

THE COURT: May I have the question read back.

(Question read)

THE COURT: This is at the closing?

THE WITNESS: Yes.

THE COURT: Yes, overruled.

A I don't recall any, sir.

Q Now, do you recall who was present at the closing?

A There were many people present there. I really can't give you the full names. There were representatives of various interests, partners, subordinated lenders. Some of the partners were there themselves, attorneys representing various people, and a number from the Finley, Kumble firm because they were basically handling the closing.

Q Did you know Mr. Risher?

A Only by name, but I don't think I could place him. He may or may not have been there.

Q Did you know Mr. Kayne?

A Same situation.

Q You don't remember whether he was there or not?

A I don't remember.

Q Did you know Mr. Muh?

A Same situation.

Q Andrew Newburger present?

A He was present.

Q Was Robert Newburger present?

A I believe he was.

Q Can you remember any other general partners who

were present?

A I think one of the Sterns was there. This was a large closing. Many people were there.

Q Were some people represented there by attorneys?

A I'm sorry?

Q Were some people represented there by attorneys?

A Yes.

Q Can you remember some of the attorneys who were present?

A Well, I have already testified that Mr. Lewis was there. I believe that his prinicpal client attended also. They were subordinated lenders.

THE COURT: Do we need to get into all of this, Mr. Mandel?

MR. MANDEL: I don't think so.

THE COURT: I think it has been established about that.

Q Now, you were aware prior to the closing, were you not, that Jeanne Donohue and Mabel Bleich and Charles Gross had certain claims which they would assert if the closi took place; is that correct?

MR. SHAW: Objection.

THE COURT: On what basis?

MR. SHAW: I believe this is hearsay, your Honor.

THE COURT: It is a question of whether he had an awareness of claims.

MR. SHAW: If it is just left like that then there is no problem.

THE COURT: Overruled.

Q Now, I ask you --

THE COURT: I take it the answer was yes?

THE WITNESS: Yes, your Honor.

Q I ask you to produce Exhibit 110 marked on your deposition. Have you got it?

A Yes.

(Handing)

(Defendants' Exhibit VVV is marked for identification)

Q What is VVV, is that a document which came from your files?

A Yes, Mr. Mandel. This document is a draft of one of the schedules to the basic transfer agreement, litigation schedule.

Q And does this schedule indicate certain liabilities which the new corporation would assume?

MR. GRUTMAN: Objection.

THE COURT: What ground?

MR. GRUTMAN: The document, if it will speak at

all, will speak for itself. From having looked at the document Mr. Mandel is putting words in the witness' mouth. There are claims. Clairs are not necessarily liabilities.

THE COURT: Well, let's find out what the witness says.

Was there some instrument --

MR. GRUTMAN: Could he tell us what it was?

THE WITNESS: Let me answer the question then.

This document itself does not answer that, Mr. Mandel. It merely says litigation. But in fact this was a schedule of obligations that the corporation was to assume.

MR. GRUTMAN: Your Honor, I object to that since the document does not say that. These are claims, and to the extent that they matured they would be assumed.

THE COURT: This is his testimony.

Q I ask you to go to the second page of the exhibit what is it VV?

THE CLERK: VVV.

Q And read Item 3 to the jury.

A Well, the caption, let me read the caption so it becomes more meaningful.

"Potential litigation in which Newburger, Loeb and/or any of its partners and/or the transferee may be a

defendant."

Item 3 reads: "Charles Gross, Mabel Bleich, Jeanne Donohue and Louis Bracker," and then under claim, "Amounts related to capital account." There is some handwritten writing which is mine. I don't know whether this is in the final or not. "Or rights or obligations under the restated articles of limited partnership of the transferor dated February 26, 1970. Threatened claims arising from or in connection with this agreement" --

MR. GRUTMAN: The document is not in evidence.

THE COURT: It is not in evidence.

MR. MANDEL: I'm sorry.

Q Go on.

A "And damages arising from non-competition clauses in partnership agreement."

That's the end of 3.

MR. MANDEL: I offer it in evidence.

THE COURT: Was this a document that was submitted and considered at the closing and became a part of the closing papers?

MR. GRUTMAN: No, your Honor.

THE COURT: What is it then?

THE WITNESS: A draft, your Honor.

MR. SHAW: Subsequently it was superseded by

a schedule.

THE COURT: Who prepared this draft, the typewritten portion?

THE WITNESS: The typewritten portion would have been prepared basically again from the -- wait just a second. This would have been prepared, apart from the Finley, Kumble firm, and I believe some of the general partners of the partnership, because we were not general counsel to the partnership and we really didn't have the basic facts on which to prepare the schedule so we would have to rely in large measure under other individuals.

THE COURT: This came to your hand on the night of February 11th?

THE WITNESS: No, your Honor.

THE COURT: When?

THE WITNESS: I don't know.

THE COURT: Roughly?

THE WITNESS: It would have been sometime, I would say, within the last two to three weeks before the closing.

THE COURT: What is the basis of the objection?

MR. GRUTMAN: Because the draft is merged in the --

THE COURT: It is not being offered for the

proof of the instrument that was agreed upon.

MR. GRUTMAN: It is cumulative because it is substantially the same of what appears here.

MR. SHAW: This has been placed in evidence by me as Plaintiffs' Exhibit 24, Schedule C, page 2, with one or two minor variations.

MR. GRUTMAN: Of no material significance.

THE COURT: Objection overruled.

(Defendants' Exhibit VVV received in evidence)

MR. MANDEL: I would now like to show the jury.

Q Will you produce 109, please, Mr. Burak.

A Yes.

(Handing.)

MR. MANDEL: Mark it for identification.

(Defendants' Exhibit WWW marked for identification)

Q Will you explain what WWW is?

A WWW --

MR. GRUTMAN: May he just identify it, please?

A It is a one-page sheet captioned "Potential Litigation in Which Newburger and/or any of its Partners and/or the Transferee May be Defendant."

This, Mr. Mandel, is another draft of the

ultimate schedule on litigation.

Q About when was VVV prepared?

A It would have been within the same framework as the other one. I can't tell which came first.

Q Now, am I reading correctly, and let me stand next to you because some of the handwriting is there -- I offer it in evidence.

MR. GRUTMAN: I object. What is the reason to take all of these drafts when they are simply cumulative of what is in the document already in evidence?

THE COURT: I don't apprehend that it is the purpose for which they are being offered.

MR. GRUTMAN: There is not any question, Judge, that the Bleich, Gross, Donohue claims were claims that were included on the schedule. The schedule was prepared by our law firm. The fact that they were possible claims was no concession of liability but merely if they were asserted they would be obligations assumed by the transferee corporation.

THE COURT: The question is when were the claims and when were they asserted, because the question of the validity of these claims and the purpose of their assertion is in issue.

Therefore, the time of their assertion or

coming into existence is relevant. This has nothing to do with the ultimate instrument. It has to do with the emergence of these claims and the circumstances under which they emerged. It is for that purpose they are being offered.

MR. GRUTMAN: We have had requests by Bleich and Donohue for the immediate return of their capital. Everybody knew that Bleich and Donohue had been asking for the immediate return of their capital.

THE COURT: This does not bear on that as I see it.

MR. GRUTMAN: I see it otherwise, your Honor, but that is your ruling.

THE COURT: Objection overruled.

MR. SHAW: No objection.

(Defendants' Exhibit WWW received in evidence)

Q And am I reading this right, including the handwriting, next to Charles Gross it says, "Amounts related to capital account, threatened claims arising from this agreement, crossed out plus threatened injunction, damages arising from non-competition clause in partnership agreement."

A That is substantially correct. You left out one

word but substantively it is correct.

MR MANDEL: May I show this to the jury?

MR. SHAW: Your Honor, I object to this because there is no issue that the transfer agreement went forward with this being noted on the schedule as a claim. The issue is whether the claim is valid.

Now, the assertion over and over again and showing this to the jury that a claim was made is calculated and could have the effect of an enhancing the view that there was validity rather than just a claim being asserted. I object to this procedure. I believe this is the essence of Mr. Grutman's objection. This is just a claim.

To say it five or six times makes it appear if the claim is valid and it is wring.

MR. GRUTMAN: Particularly since the existence or the potentiality of the claim is set forth in the document. There is no question about that. Everybody knew about it.

THE COURT: Mr. Mandel's position is that these claims were without foundation.

MR. GRUTMAN: His claims?

MR. SHAW: They were with foundation.

MR. GRUTMAN: That is our claim, they are without foundation.

MR. MANDEL: My position is before they closed this deal they knew, and over and over again both sides were working on the description of what our claims were going to be and make sure that the corporation would be bound no matter which form the claims were cast.

So all of these drafts and the concentration on this particular clause during the weeks before the closing shows that the general partners and Mr. Persky and his clients and the corporation knew and were preparing for the fact that claims were coming from Gross and Bleich and Donohue and that their bringing of this action was an attempt to masquerade as plaintiffs and jump in first.

THE COURT: I misapprehended the purpose of the offer then.

I do not see that we have done any harm.

MR. GRUTMAN: When you parade it in front of the jury's faces six times --

THE COURT: It has not been done six times, Mr. Grutman, it has been done twice.

MR. GRUTMAN: Three so far. The other point is this, Judge: We only knew what Mr. Mandel had been asserting. We have had the testimony and the jury has heard through Mr. Silverman's notes that Mandel on behalf of Gross, Bleich and Donohue claimed he had claims which

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were superior.

THE COURT: Let's go on to another subject. I thought this was being offered for another purpose.

BY MR. MANDEL:

Q Mr. Burak, I ask you to produce Exhibit 99 from your file, 99-A and 99-B.

What are those documents, sir?

A Exhibit 99 purports to be a copy of a letter from Fred Kayne, Newburger, Loeb & Co. letterhead, addressed to Paul Risher, Newburger, Loeb & Co.

Q Date?

A December 30, 1970.

Q And are there attachments to it?

A I can't tell whether they are attached or not. There is a paperclip. There is no staple but you can't tell because these are xeroxes.

99-A appears to be a form letter dated August 24, 1970 and it is signed by Newburger, Loeb & Co. without any signature.

99-B appears to be the same as A in format dated August 31, 1970. This one appears to have been signed though.

Q And do these documents come from your file?

A Yes, they do.

Q Kept in the regular course of business?

THE COURT: No. Letters are not kept in the regular course of business.

Do you offer them on other grounds? Any question that they are authentic?

Why don't we take our recess while you are looking at these.

(Recess)

(In open court - jury present)

THE COURT: Objection on the offer of letters.

MR. SHAW: I object on the ground there is not a sufficient foundation for the receipt of this document in evidence, your Honor.

THE COURT: Any question as to their authenticit

MR. SHAW: I have not seen the document before, your Honor, and I am not willing to waive that objection at this time. I don't believe this witness is a proper witness by whom to put this document in.

THE COURT: Let's mark it for identification.

(Defendants' Exhibit XXX marked for identification)

THE COURT: Come to the side bar, please.

(At the side bar)

THE COURT: Is there any question that that is Mr. Kayne's signature?

MR. BIEHL: I have not shown it to him. I will be glad to.

THE COURT: Any question that Mr. Risher got this from Mr. Kayne?

MR. SHAW: I have no idea.

THE COURT: Did you ask him? He is one of your clients?

MR. SHAW: I will be glad to.

THE COURT: Would you, please.

(Pause)

MR. BIEHL: It is Mr. Kayne's signature.

THE COURT: It will be admitted against Mr. Kayne.

(Pause)

MR. BIEHL: Mr. Kayne recognizes his signature but he has no recollection one way or the other as to whether the two pages attached were sent.

MR. SHAW: Mr. Risher recalls the covering letter and not the attachments. He further says it is not contained in his file. He confirms this is not a document turned over to me. I prefer we proceed in orderly fashion with this exhibit and that it be fully authenticated and

there be testimony about it.

THE COURT: I do not follow when you say "orderl fashion." Either an exhibit is admissible and it is part of a party's case.

There is a foundation. Mr. Kayne says it is his signature. He has no recollection -- Mr. Kayne's counsel tells me he has no clear recollection of whether the attachments were included.

I don't know about the second one. The first one is mentioned, Mr. Mandel. I don't see that the second one is mentioned.

MR. MANDEL: May I have a look?

MR. BIEHL: That was our reading.

MR. SHAW: Because of the problem with attachments I am not going to waive authenticity at this point. Evidently, this is not without my talking with Mr. Kayne's attorney at all. He in independent consultation with his client has also concluded there is a question as to whether the attachments were annexed to the letter when it was received.

THE COURT: The letter contains its own interna office that there was an August 24th letter attached. I will allow that. I will remove the third one. I will admit it at this point against Mr. Kayne.

(In open court)

THE COURT: May the record show that XYX is received in evidence at this point against Mr. Kayne and Mr. Persky.

I assume, therefore, against Finley, Kumble of whom he was a partner.

MR. MANDEL: The record should also show that the second --

THE COURT: There is no proof of receipt. So at this point it is admitted only against Mr. Kayne.

MR. MANDEL: I think the record should show that you have not admitted the August 31st enclosure.

THE COURT: The August 31st sheet of paper stapled to the back because there is no showing it was an enclosure with XXX.

MR. SHAW: May that be separately marked?

THE COURT: If you like.

Make it XXX-1.

MR. MANDEL: May I make it YYY for identification?

THE COURT: Whatever you like.

(Defendants' Exhibit YYY marked for identification)

MR. MANDEL: Your witness.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Burak, the events about which you have testified here this morning took place over four years ago; is that correct?

A Yes, sir.

Q And in giving the testimony which you have given on direct examination are you essentially relying upon your recollection as to what took place at that time?

A That is correct.

Q In testifying as to the sequence or the chronolo in which events occurred, have you referred to office diaries or are you just relying on your best recollection?

A Well, office diaries would not be relevant on this point.

Q So as to whether or not certain things occurred at particular points in time on one day or another, would you concede that perhaps you might be mistaken as to some of that?

A Yes, I would.

Q The documents which were shown to you, VVV and WWW, these represent drafts of certain schedules which were appended to the transfer agreement itself; correct?

A That is correct.

Q Were there with various claims, particularly, for example, the potential itigation shown on VVV, Charles Gross, Mabel Bleich, Jeanne Donohue and Louis Bracker, and over the description of the claim it said, "Amounts related to capital account, threatened claims arising from this agreement and damages arising from non-competition clauses of the partnership agreement," that means this was the nature of the claim; is that correct?

A That is correct.

Q Did that necessarily mean that there was an acknowledgment by the transferee corporation that if the threatened or incipient claim were asserted, that it was necessarily valid?

A No.

Q It did not?

A It did not.

Q Very well.

Would it be correct to state that by scheduling these potential litigations, all that was being set forth on these schedules was the fact that if such claims were asserted and if liability were found, in whatever amount, that was liability that would be assumed by the transferee corporation?

A That is correct.

Q And there was no concealment of this because the schedules set it forth; correct?

A Black and white.

Q And it was a proper thing to do?

A Well, we represented the partnership and we were trying to get as many liabilities or potential liabilities assumed by the corporation.

Q Did you sense, since you say these schedules were prepared by the Finley, Kumble office, that that office was trying to hide or conceal anything?

A No.

Q In the work which you did with even Mr. Persky or Mr. Bamberger, or Mr. Rosenblum, or whatever other people in the firm, did you sense they were trying to cooperate with you?

A In the preparation of the schedules, absolutely.

Q And in the general working relationship which you had as one law firm to another, was there a general sense of cooperation?

A There was.

Q Mr. Burak, I think you said that as a specialty it is corporate law which is the area of your particular expertise.

A That is correct.

Q Therefore, I gather that going to closings is not a thing which is outside the province of your usual activities?

A I have been to a few.

Q Now, in the few, as you have modestly characteri them, have you ever encountered situations where a similar type of opinion letter which your firm was being called upon to provide has been the subject of discussion, argument and differences of opinion?

MR. MANDEL: I will object to that.

THE COURT: Sustained.

Q Is it common or uncommon, Mr. Burak, to have problems about giving opinion letters?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Do I state it correctly that your best recollection is that as you were working towards the closing of February 11th you had advised the Finley, Kumble office that you were having a problem about giving the opinion?

A That is correct.

Q I show you a letter -- do you have the original of this? -- under date of February 6, 1971, which you wrote to Michael Bamberger?

A If I wrote it then I would not have the original.

Q Well, a copy will do.

A What is the date?

Q February 6, 1971. It is a special delivery letter.

A I should have a yellow copy but I don't. Here is a white copy.

(Handing)

(Defendant Finley, Kumble Exhibit X marked for identification)

Q This letter which has now been marked Finley Kumble Exhibit X for identification, is that the last letter that you wrote to the Finley, Kumble office before February 11, 1971?

A Well, I'd have to check my file. I couldn't answer that.

Q Surely.

(Pause)

A Yes.

Q Have you read that letter over before taking the witness stand today?

A No, I have not.

Q Is the letter a letter, however, you sent to Mr. Bamberger of Finley, Kumble?

A I should have a yellow one in my file. I don't

know why I don't.

Q That is my copy. The one before you is all that is there.

A That's interesting because it indicates -- that is not my signature.

Q That's not?

A Wait a minute. That could be a secretary that did it.

Q It says HFB -- HPB.

A That's not my signature.

Q Is the copy in your file, does it have the logo at the bottom HPB?

A Yes.

Q H. Paul Burak.

A Yes. Let me make it clear, HPB are my initials. This is the letter number. PH were probably the initials of a secretary. I should have a yellow copy in my file, but this is in my file so I presume it was sent.

MR. GRUTMAN: I offer theletter in evidence.

MR. MANDEL: I believe it is irrelevant. Let me give a copy to the Court .

(Handing)

I don't particularly care but I believe it is irrelevant.

MR. SHAW: No objection.

THE COURT: Yes, it may be received.

(Defendant Finley,Kumble Exhibit X is received in evidence)

Q Is it correct, Mr. Burak, that in the letter of February 6, 1971, you did not advise Mr. Bamberger on that date that your firm would refuse to give the opinion letter?

A Well, I'll have to read it.

THE COURT: The letter speaks for itself, Mr. Grutman.

Q Do you have a recollection, Mr. Burak, of having written to Mr. Bamberger and having said to him that your firm would refuse to give the opinion letter?

A No, I have no recollection of writing Mr. Bamberger.

Q Is your best recollection that you did not write to Mr. Bamberger?

A Yes, that is my best recollection.

Q Or to Mr. Persky or to Mr. Rosenblum or to anybody in the Finley, Kumble office stating that your firm would refuse to give an opinion?

A That is correct.

Q Would it also be correct that as you approached

the prospective closing you still continued to work towards the possibility of preparing an opinion?

A I don't think that is correct. We were working--

Q I will take that answer and go on to the next thing.

Do you know what a qualified opinion is?

A Well, let me put it this way: There are qualified opinions and there are subject opinions and there are all sorts of opinions. Now you would have to be a little clearer.

Q When I say a qualified opinion, if you held to the view that the signature of all the limited partners, including limited partners in withdrawal were required, did you consider rendering an opinion in which you declined or demured to express an opinion because of the non-signature by one or more of the limited partners?

A You'll have to read that back, but if I think I have your question right, the answer is no, we did not.

Q All right.

The opinion memorandum which you had -- what is that exhibit, Mr. Mandel?

The one Mr. Freedman prepared.

A Right.

MR. SHAW: TTT.

Q It was Mr. William Freedman who prepared this memorandum for you?

A That's right.

Q He was not a partner?

A He was not.

Q Was he an associate?

A Yes.

Q Of how many years experience was Mr. Freedman who composed the memorandum?

A I don't know. He is not in our firm. He is on his own. I would say a few years out.

Q A few years out of law school when he wrote this memorandum for you?

A That's my best guess but I really don't recall.

Q And this young associate had prepared, under your supervision, represented the opinion that you were willing to adopt on behalf of your firm?

A Yes. Because I have already testified we discussed this --

Q And --

THE COURT: Let him finish his answer.

A I may not have stated it in those words in the memorandum but I want to make it clear we discussed this and we took that position.

Q Very well.

Your partner, Max Freund, had been the member of the firm who had been primarily concerned with this matter?

A Yes.

Q You came into the picture sometime in January and were intermittently involved between January and the time of the closing?

A Yes.

Q Is the reason you attended the closing because Mr. Freund himself was otherwise unavailable?

A I don't believe so. I think what happened was that it got to the point where we were going to do a closing and he wanted somebody with corporate background to handle the closing. Mr. Freund is primarily a litigator.

Q Do you have any piece of correspondence in your file which reflects that Exhibit TTT, the Freedman memorandum, was ever mailed or delivered to the Finley, Kumble firm?

A No, there is no correspondence.

Q There was, however, a passing back and forth between your office and the Finley, Kumble office of documents and enclosures, were there not?

A Yes, there were.

Q Therefore, you have no way of saying that the document itself, your memorandum, was ever supplied to Finley, Kumble?

A No. I have already testified, Mr. Grutman, that we may have given it to them. I really don't know. You have to remember that at this time we were in daily contact. They would come to my office, I would go to their office. So that it is possible but I can't recall that a copy was actually given.

Q And there is no record in the file of it ever having been submitted to Finley, Kumble?

A That is correct.

Q Had you considered what the consequences would be in the event that there was a transfer without the signature of the limited partners?

A One of the things that we worked for and I believe we got was an indemnification provision in the agreement.

Q Assume that the transfer had gone forward, without the Rosenman firm opinion and that everybody had signed and approved with the exception of Bleich and Donohue, did you consider what remedies would be available to Bleich and Donohue?

A No, I did not.

Q Well, as a lawyer, versed in corporate law, does it occur to you that the remedies which Bleich and Donohue would have would be for an a ounting?

MR. MANDEL: I object. Irrelevant.

THE COURT: Sustained. As he sits here today I do not see how that is relevant.

MR. GRUTMAN: In this lawsuit, Judge, one of the issues, and he has given opinions and adopted the opinion ofhis subordinates as to what the partnership law required and that today is evidence that we should be entitled to know what the state of his knowledge was as to the consequences of going forward without their signatures.

THE COURT: I only ruled as I did because your question was directed to 1975.

Q In 1971, as a member of the firm, versed in corporate affairs, did you take into consideration that in the event that the partnership transferred the assets to the corporation without the signatures of Bleich and Donohue, there were a number of remedies which were available to Bleich and Donohue?

A The answer is that we were hoping that we would have an indemnification provision which would protect the partnership.

Q I'm not speaking about the protection of the

partnership. I am asking you whether you --

A You have to understand though that I am looking at this as special counsel to the partnership.

Q I am asking you however as a lawyer.

THE COURT: You asked him what he considered at that time and he is telling you .

Q I am asking you as a lawyer, did you consider what remedies Bleich and Donohue or Gross might have against the partnership or the corporation?

MR. MANDEL: Asked and answered three times, your Honor.

THE COURT: I cannot hear you, Mr. Mandel.

MR. MANDEL: Asked and answered three times. I think Mr. Burak has three times said no, that he did not consider the consequences of the remedies.

MR. GRUTMAN: He said he wanted an indemnification.

THE WITNESS: I think maybe you are both fencing but I can only put it this way:

There were threatened claims and counterclaims. They were known, I believe, to all concerned. One of the things that we attempted to get was an indemnification provision that would protect the partnership.

Now, I can't go back four and a half years and

tell you what was --

Q I'm asking you, Mr. Burak, about the state of your knowledge as a lawyer in 1971. You wanted an indemnification, that means a promise to protect the partnership by somebody in the event that a claim was brought; isn't that what you are saying?

A In effect, yes.

Q The kind of claim that could be brought if Bleich or Donohue felt that they were aggrieved, wouldn't that claim be in the nature of an accounting, to get from the partnership or the corporation whatever it was that they claimed they were entitled to?

MR. MANDEL: I object.

THE COURT: Overruled.

A You are asking me could it have been that? It might have been that.

Q Can you think of any other damage which you took into account at the time that you were seeking an indemnification which you believed was a remedy available then to Bleich and Donohue?

THE COURT: Do not answer. There is no foundation for that because he did not give you anything more than a might have answer to the last one.

MR. GRUTMAN: Very well.

Q By the way, do you know as a corporate lawyer what an accounting is?

A It depends in what sense you are talking about.

Q In a dispute between members of a partnership.

A Well --

MR. MANDEL: Why is this relevant, your Honor?

THE COURT: I am not quite clear that it is.

MR. GRUTMAN: I think, your Honor, that Mr. Burak is an expert on corporate and partnership law.

THE COURT: Fine. You have to go further than that to have relevance to this case.

MR. GRUTMAN: If you are talking about claims and one of the claims that could have been asserted would have been an accounting, I think the jury is entitled to know what an accounting means in that sense.

THE COURT: You have raised the question of the accounting. He has not accepted that.

Q Let me ask you, isn't it a fact that in claims between members of a partnership one partner as against another, the remedy where such a dispute exists is always by way of an accounting?

MR. MANDEL: I object to that.

THE COURT: I do not understand the purpose of

this line of questioning at all.

MR. GRUTMAN: The purpose of this line of questions is to show what the consequences about going forward with the transfer agreement. If it turns out that all that Bleich and Donohue or Gross ever had was a claim for an accounting, that is a fact which is most material for the members of the jury to know.

MR. MANDET: That is for your Honor to determine.

THE COURT: We are dealing here with rights under Section 98 of the Partnership Law.

MR. GRUTMAN: Under all the Partnership Law. The only remedy in a dispute over financial matters between members of the partnership --

THE COURT: That is a point you may argue. This witness in only here to testify as to what his firm's position was at the time. If you wish to question as to the validity of his firm's position, that is one thing.

As to the authenticity of any instrument he has put in, as to his credibility, you may do that.

MR. GRUTMAN: How about his expertise?

THE COURT: Going to the subject matter of that memorandum, of course.

MR. GRUTMAN: Very well.

MR. SHAW: One brief statement.

I believe this issue is relevant on the question of any direct relationship between anything that was done and any injury to any party in this lawsuit. Without this intermediate step there is no causal relationship.

THE COURT: That is not going to be raised on the direct examination or the cross examination of this witness today.

Q Mr. Burak, the partnership law in the State of New York in existence in 1971, was that not the Uniform Limited Partnership Act which had been enacted into law as part of the Laws of the State of New York?

A I believe so, but I'm not certain.

Q From the knowledge that you had in 1971, were you aware that that statute on its face was a remedial statute "drawn to overcome the strict interpretations which were frustrating the purpose of statutory limited partnerships"; did you know that?

A Let me make this very clear, I mean I can't sit here now and answer you yes or no to a question like that because it puts -- it is the type of thing where --

MR. GRUTMAN: Judge --

THE COURT: I am going to permit him to answer this way.

A You give me a quote and you state that the

statute was remedial. I may very well have seen that in the text at the time. I may not have. I can't answer that now four and a half years later.

Q And you don't know five years later whether or not you were aware that the statute was drawn to overcome the strict interpretations which were frustrating the purpose of statutory limited partnerships?

A I can't answer it any other way, I'm sorry.

Q In the research which was being done by Mr. Freedman under your aegis, did you look into the purposes of the partnership law, particularly Section 98?

A I myself did not do the underlying research.

Q So to that extent you relied upon your younger associate?

A Yes, but I want to make it clear though that we did discuss this.

Q I understand. You didn't do the research so you relied on what Freedman told you; right?

A It is more than relying on what Freedman told me. When we would discuss this matter I would ask him questions, go back and forth. I can't tell you now what specific questions I may have discussed with him in a memoran back in '71.

Q Do you remember whether or not at the time that

you and Mr. Freedman discussed the problem of Newburger, Loeb you had advised Mr. Freedman of what the financial plight of Newburger, Loeb was?

A I cannot recall specifically, but I certainly would have in the normal course explained to him the background situation.

Q Did your knowledge at that time, such as you imparted it to Mr. Freedman, include the statement that the financial plight of Newburger, Loeb was such that it was faced with potential suspension, dissolution and bankruptcy of the firm and the partners?

A I probably would have, at least to the extent that I know that the New York Stock Exchange. My recollection is that the New York Stock Exchange had given a deadline that if the transaction had not been closed by a certain date they were going to suspend Newburger, Loeb from trading.

Q Did Freedman, to the best of your knowledge, report to you at the time that he did the research about a particular case called New York Creditmens Adjustment Bureau against Weiss, New York State Court of Appeals case decided in 1953?

A I would have the slightest recollection.

Q Did you understand that the state of the law, such as it existed in 1971, where there was the threat of

destruction of the limited partners capital by dissolution of the firm, obligated the general partners to conserve and protect the assets of the partnership to the extent that they possibly could?

A Again, I can't give you a recollection now to my knowledge of the state of the law was back in 1971.

Q To that extent again I assume it would be correct to say you relied on the research which was done for you by Freedman?

A Well, you keep asking me that and I keep going back and answering it the same way.

Q Just so the record is clear.

MR. MANDEL: I object.

THE COURT: I sustain the objection.

Q Do you recollect in the discussions which you had with the Finley,Kumble firm when you made known to them in 1971 that you were having a problem, gounded itself on Subsection B of Section 98 of the Partnership Law which provided that the general partners could not "do any act which would make it impossible to carry on the ordinary business of the partnership." That is the statutory language as I read it to you verbatim.

Do you remember that was the provision of the Partnership Law with which you were wrestling?

A Very hard to recall whether that was specifically it. I know that Article 98 was involved. Whether it was that specific subsection or another, I couldn't tell you.

Q It appears on Mr. Freedman's memorandum, TTT in evidence, where it talks about "New York Partnership Law requires that a disposition of property of a limited property which would make it impossible to carry on the ordinary business of the partnership be consented to or ratified by all of the limited partners."

Do you see the words there "ordinary business"?

A Yes.

Q Did you have in your mind on the night of the closing, February 11th, that if the transfer agreement was not consummated on that night, the ordinary business of the partnership was over and the Stock Exchange would put it out of business the following morning?

A Yes. I think it was, and I don't know whether it was that day, but I think it was fairly well understood that unless the closing took place, or some other arrangements, and I can't think of what other arrangements there might be, the New York Stock Exchange would suspend the company.

Q So would it be a possible interpretation of Section 98, which reasonable men could entertain, that the

reasonable business of the partnership was over on the following morning unless something was done that enabled it to survive?

MR. MANDEL: I object.

THE COURT: I sustain the objection on the ground that it is directed at today, Mr. Grutman.

Q Did you realize in 1971 that unless something were done to resuscitate Newburger, Loeb financially, its ordinary business was over on the morning of February 12th?

THE COURT: He answered that question. The question you had asked is whether reasonable men could disagree on the night of February 11th as to the meaning of this statute given the financial picture.

Wasn't that your question?

MR. GRUTMAN: That is correct.

THE COURT: Can you answer that?

THE WITNESS: Yes. I think reasonable men can differ.

Q I take it then, Mr. Burak, that what you are telling us is that you and your firm had one opinion about the applicability of Section 98 of the Partnership Law and the Finley,Kumble firm had a different opinion; correct?

MR. MANDEL: I object.

THE COURT: Overruled.

A The Finley, Kumble firm, I have already testified had said that they had sent an associate -- I am sorry I used the word boy before -- to the Bar Association and as far as they were concerned there was no problem.

So, to that extent I assumed that they did have a different opinion.

Q Assume that they did, because as you know the Finley, Kumble firm did render an opinion at the closing.

A Correct.

Q And the opinion which the Finley,Kumble firm rendered was not in accordance with your view of the law; is that correct?

A It must have been. I don't recall what Mr. Presky wrote but it had to be.

Q Is it your testimony, Mr. Burak, that the opinion which Finley, Kumble had, and which differed with yours, was an opinion which you as a lawyer believed they could have had in good faith?

A I have no opinion as to, you know, whether it was in good faith or not good faith. Certainly anybody could render an opinion. We couldn't render it.

THE COURT: Has he finished his answer? Had you finished your answer?

THE WITNESS: Your Honor, I really don't have any

opinion as to whether it was rendered in good faith or not.

Q Let's put it this way: You agree, however, that competent reasonable lawyers could have had differences of opinion about the applicability of Section 98; isn't that true?

A Yes, I would think it would be hard not to find that in almost any situation.

Q In this situation you know that sixteen other law firms concurred with the Finley, Kumble firm because their clients signed the agreement.

MR. MANDEL: I object.

THE COURT: Sustained as to form.

Q Didn't the sixteen other law firms who were present all permit their clients to sign the agreement?

MR. MANDEL: I object.

THE COURT: The answer is they did.

Q And Mr. Burak, didn't your client, Andrew Newburger, sign the agreement in your presence after Finley, Kumble had rendered the opinion?

A He certainly did.

Q During the course of time you were dealing with the Finley, Kumble office, did you get any impression from the way in which they conducted themselves that they were acting in other than good faith with you?

rdjw 88 Burak - cross

THE COURT: Sustained.

MR. GRUTMAN: Your Honor, if the question of good faith is present and he was a participant, could we inquire the state of his knowledge in the way he believes Finley, Kumble conducted itself?

THE COURT: I am troubled by your use of the word impression. The sweep of the time and a great number of things here.

Q Did the Finley, Kumble firm say anything during the course of the time they dealt with you that indicated other than they were acting in good faith?

MR. MANDEL: I object to that. This calls for an improper conclusion.

THE COURT: Yes, I am going to sustain this. Given the broad sweep of this. I think if you restrict yourself --

Q Mr. Burak, did the Finley, Kumble firm do any act which you thought was in bad faith?

THE COURT: You may answer.

A I can't think of any. I mean it was most unusual for them to be issuing an opinion to both sides to a transaction but I don't really consider that bad faith.

Q Do you remember, Mr. Burak, on the night of the closing, somebody asking, in the presence of all those

assembled lawyers and clients, after you at the closing had advised that you would not render the opinion, someone asked whether anyone had considered the question; do you remember that taking place that night?

A No. What night are you talking about?

Q The night of the closing when the announcement was made, whenever it was at the closing that you would not render the opinion. Do you recall one of the people in that room asking, has anybody else considered the question? And Mr. Persky stating that Finley, Kumble had.

Do you remember that taking place?

A No. I remember Persky saying that he would issue the opinion but I don't recall the question being put by anybody to Persky to that effect.

Q And when you say you don't recall it having taken place that way, are you saying it did not or that it may have or you just don't remember?

A I am saying what I said before, that I don't recall.

Q But in stating that you don't recall, is that perhaps because of a lapse of your memory or are you saying to the best of your recollection that did not happen?

A I am just trying to think now.

(Pause)

I can't recall. I'm sorry, I just don't remember whether the question was put to Mr. Persky or not.

Q Do you remember Mr. Persky withdrawing from the meeting with Mr. Bamberger for a period of time to draft an opinion letter which was circulated among all of the counsel who were present?

A No, I have already testified I don't know whether he did it at the time or whether he had already prepared it.

Q So you are not suggesting by your testimony here today that Persky came to the closing with an already drafted opinion letter, are you?

A I'm saying I don't know.

Q All right.

Do you remember a draft of an opinion letter being circulated which you perused or scrutinized?

A I don't know whether it was a draft or not.

Q Do you remember an opinion letter?

A Yes, I do.

Q Was it submitted to all of the lawyers, including yourself?

A I don't know whether he read it out loud or submitted around the room.

Q How did the opinion letter impress you?

A I'd have to read it.

Q I show you Finley, Kumble Exhibit E.

(Handing)

A (Reading)

Yes. Number one, I said I felt it unusual that he would be issuing an opinion for both the transferee and transferor.

Number two, obviously we were not in agreement on the substance of that.

Q As to somebody issuing an opinion who was doing so on behalf of the transferor and the transferee,if that was a fact which was disclosed and was consented to by all of the parties would that in your judgment have been an impropriety?

MR. MANDEL: I object to that for a number of reasons.

One, there is no foundation for it in fact --

MR. GRUTMAN: The testimony of Mr. Steefel, Mr. Bialkin, Mr. Persky and Mr. Berkowitz.

MR. MANDEL: Let me finish please.

The fact is that Bleich and Donohue did not consent to having Mr. Persky act in a double capacity. That was not disclosed nor discussed.

THE COURT: I sustain the objection.

MR. MANDEL: Furthermore, your Honor --

THE COURT: I sustained the objection.

Q Did anybody object at the meeting to Mr. Persky rendering the opinion?

A I don't recall any objection, no, sir.

Q To the best of your recollection isn't it a fact that nobody objected?

A I believe that is correct.

Q And nobody objected to his preparing the opinion and nobody objected to the opinion which he prepared and circulated, isn't that true?

A That's correct.

Q And weren't the lawyers who were present and to whom that opinion was circulated, including among them a number of very eminent and reputable practitioners?

MR. MANDEL: I object to that.

THE COURT: Sustained.

Q Were a number of the lawyers who were present, to your knowledge, experts in the area of corporate law?

MR. MANDEL: I object.

THE COURT: I sustain the objection .

Q Were you familiar with the experience of some of the lawyers who were present?

MR. MANDEL: Objection.

MR. GRUTMAN: Judge, there is a question here that this man is just -- I have said what I have to say.

I think I should be permitted to establish what Mr. Burak knew about the quality of the lawyers who sat there and who accepted that opinion.

THE COURT: You already have that in the record from the lawyers, at least two of the lawyers themselves. What his opinion is as to their abilities it seems to me is completely irrelevant.

I sustain the objection.

You had Mr. Steefel on with his background, Mr. Bialkin with his background. I sustain an objection to this.

MR. SHAW: I think the question is relevant, if not from Mr. Grutman's point of view but from the point of view of the other persons, including those represented by Mr. Persky as to whether or not these other persons who were attorneys said anything or reacted or objected. How can laymen be expected to do anything else then?

THE COURT: The question was his opinion as to their respective abilities. That was the question, what did he think of their abilities in these fields.

Q When the opinion letter was circulated did

anybody at the table, yourself included, say this is all wrong, this can't be, it is a sham, I won't be a part of it?

THE COURT: He answered that already.

MR. GRUTMAN: Including himself.

THE COURT: Four questions ago.

MR. GRUTMAN: Including himself?

THE COURT: Yes, including himself.

Q Mr. Burak,after the opinion letter was circulated you permitted Mr. Newburger, your client, to execute the transfer agreement; is that correct?

MR. MANDEL: I object to the leading and the word "permit". A lawyer does not permit and control what a lawyer will sign. It is an utterly improper suggestion. It is leading.

MR. SHAW: I object to that.

MR. MANDEL: This witness should not be allowed to be led by Mr. Grutman.

MR. GRUTMAN: It is corss.

THE COURT: I will sustain the objection. You may ask him --

Q Did Mr. Newburger sign the transfer agreement?

A Yes, sir, he did.

Q Did he sign the transfer agreement without your

objection?

A Without our objection.

Q And when he signed the transfer agreement based upon what you knew, did you believe that your client's act was in his best interests?

A I would say yes.

MR. GRUTMAN: Thank you very much. No further questions.

CROSS EXAMINATION

BY MR. SHAW:

Q Did your client make up his own mind with respect to the legality of his signing this agreement?

A I have no idea how he made up his mind.

Q Did you advise him with respect to the legality of signing the agreement?

A I have already testified, Mr. Shaw, that we told him that we didn't think that we could give our opinion because we needed all of the signatures of the limited partners.

I have also testified that what we tried to do was to get as broad an indemnification provision as possible to cover any possible claims that might be raised by whoever was on that list, Gross, other people involved.

Q Did a time come that evening when he signed the

agreement?

A Well, he signed it. I don't know whether it was in the evening or afternoon or what, but he signed it.

Q Before he signed the agreement, did he receive from you the opinion or the statement that he could go forward and sign the agreement?

A I don't recall a statement to that effect, no.

Q Well, was there a conference or conversation between you and your client before he signed it, yes, he could go forward and do it?

A I don't recall the specific conversation, no, because our client had already known our position on this matter.

Q And was it your position that this was in the best interests of your client and he should sign it?

A Well, you know, I can't really answer what was in his mind as to what processes he went through. We obviously were trying to get this transaction closed because, as Mr. Grutman indicated before, the New York Stock Exchange did have a deadline.

Now, I don't recall whether the deadline was that day or the next day but unless something were done the company would be closed down.

Q Was whether to sign the agreement or not a

legal issue or legal question?

A I mean I think that's very hard to answer. It's lega, it's factual. It is what goes into a man's mind. I can't tell you or anybody else to sign an agreement

Q And did your client rely upon you for legal advice at this time or was he making his own mind up as to what the law was?

A I have already said I can't tell you what was going on in his mind. We have previously said we would not give an opinion on behalf of the partnership. That was communicated. What more could I tell you?

Q Did your client rely on the opinion letter of Persky?

A I have no idea what he relied on.

Q Was the opinion letter communicated to your client?

A You see, my problem is I don't recall whether Mr. Persky circulated this or whether he read it out loud or whether he merely said that he would give the opinion on behalf of the partnership.

Q Now, your client, I believe, was Robert Newburger -- Andrew Newburger or both?

A We were special counsel to the partnership. I'm not sure whether we represented Robert Newburger or not.

I don't think we did.

Q At one point did Mr. Freund represent Andrew or Robert Newburger?

A Well, I know we have done work for Andrew Newburger and I think we represented him. Now, we may have represented at some point Robert Newburger also but I'm not sure. I think he had -- I think he had separate counsel, if I am not mistaken.

Q And at this point, February 11, 1971, did your firm represent Mabel Bleich or Jeanne Donohue?

A Individually?

Q Yes.

A No.

Q And were they at that point to your knowledge represented by other attorneys?

A I'm not sure whether Mr. Mandel was representing them at the time or not, but if anybody were representing them I believe it would have been Mr. Mandel.

Q And when you were requested to give an opinion or make an opinion, were you requested to make that opinion by or on behalf of Miss Bleich or Mrs. Donohue?

A No. The transfer agreement I think was clear on that. This was to be given by the partnership. Counsel, special counsel for the partnership, not for any individuals.

Q Did you understand as of the time when youwere preparing the opinion letter that there was a --

A Excuse me, we didnot prepare any opinion letter.

Q Did you understand at the time you were preparing the memorandum on the issue of whether or not there would be an opinion letter, that there was a rift or disagreement between the partnership at large and Miss Bleich and Mrs. Donohue?

A I'm sure we must have known it about that time.

Q And when you were preparing the memorandum and discussing it and considering the question, was there any feeling on your part that you were representing Bleich or Donohue?

A As I said, not in any individual capacity. We acted as special counsel for the partnership.

Q Now, at any point did you consider whether or not what the partnership was doing was in breach of any fiduciary relationship existing between the partners and Miss Bleich or Mrs. Donohue?

A No. I never got into the question of the prospective claims or counterclaims.

Q Now, did any of the partners whom you represented to your knowledge have deficit capital positions?

A I think Andrew Newburger had one but I may be wro

Q By virtue of the agreement, can you recall what occurred with respect to this deficit capital position?

THE COURT: Mr. Shaw, how is this cross examination of this witness relevant? I would like to finish with this gentleman who has come from vacation to testify.

MR. SHAW: Let me be quick and perhaps I will lead a little.

Q Did you consider any forgiveness of Mr. Newburge. deficit capital position a bribe or special inducement to persuade him to enter into this agreement?

A No. First of all, let me make this clear. I believe there were a number of partners in that position and it was part of the transaction that there would be certain forgivenesses. As to whether or not that was ever considered to be a bribe, the answer is of course not.

Q Is it unusual for partners having deficit capitals to readjust their capital position and in between themselves remove a portion of the deficit?

THE COURT: Sustain the objection.

Q Now, did you consider how or what the impact upon Mr. Newburger would have been if the transfer agreement did not go forward?

A I recall that there were some discussions as to

what might have happened if the agreement did not go through, but I can't recall anything specific.

Q Was Mr. Newburger married at the time?

A Yes, he was.

Q And did he have children?

A Yes, he did.

Q Did he have a home?

MR. MANDEL: I object.

THE COURT: What issue does this bear upon?

MR. SHAW: The fact that if the agreement did not go forward the effect upon this man's --

THE COURT: I appreciate that. We are now dealing in cross examination of Mr. Burak and I am trying to see what issue of his direct examination this bears upon.

MR. SHAW: Perhaps I am making him my witness at this point. I don't hear any objection that I am leading.

THE COURT: I heard objection from Mr. Mandel to the subject matter.

MR. SHAW: It seems to me I should be permitted to inquire into this. I think it is a relevant issue as to what would have happened to all these people if the agreement had not been entered into. I don't think we should put blinders on at this point.

THE COURT: I will sustain the objection. It is not proper cross examination.

Q Had you attended various meetings of the attorney and parties prior to February 11, 1971?

A There were meetings that I attended, yes.

Q And at these meetings, did you hear various claims being asserted by Mr. Mandel?

A I recall at least one meeting that Mr. Mandel attended. It was at the law firm of --

Q Golenbock & Barell?

A Golenbock & Barell. There may have been another meeting also but I believe there was also one meeting.

Q Can you recall if at this meeting, Mr. Mandel was making demands in behalf of his clients that they receive something they were not entitled to under the partnership agreement or the partnership law?

MR. MANDEL: I object.

THE COURT: Sustained.

MR. SHAW: I will break it up.

THE COURT: The subject matter is way beyond the scope of direct, Mr. Shaw.

MR. SHAW: Then I will make him my own witness on the point.

THE COURT: We had a lot of cross examination in this area from Mr. Grutman.

MR. SHAW: I also think it might be relevant to Section 98.

THE COURT: In what way?

MR. SHAW: Well, maybe I can put the question to the witness.

Q Mr. Burak, in your opinion can rights under the law be wrongfully exercised?

MR. MANDEL: I object.

THE COURT: Yes, sustained. I am not going to permit this.

Let's go on with cross examination.

Q In your opinion, can rights under Section 98 be wrongfully exercised?

MR. MANDEL: Object.

THE COURT: Sustained.

Q Would the exercise of a right under Section 98 of the Partnership Law for the purpose of obtaining something that the person was not entitled to through a threat of bankruptcy or destruction of a business or injury to persons have anything to do with whether those rights existed?

MR. MANDEL: Objection.

THE COURT: Sustained.

Mr. Shaw, go on to another subject, please.

Q As a matter of law can a party who is in breach of an agreement rely upon that agreement?

MR. MANDEL: Object.

THE COURT: Sustained.

Q As a matter of law, can a person who is in violation --

THE COURT: You are making this man an expert witness here for legal principles now.

MR. SHAW: Is the objection that I am asking the question in the present tense and I should go back to '71?

THE COURT: Even if it were '71 I do not see how it bears to what this man testified to on direct. It either bears to the subject matter or has to do with credibility or some authenticity of some instrument or interpretation. It does not bear on any of that. This is making him an expert.

MR. GRUTMAN: May I be of some help? Doesn't it bear --

THE COURT: I do not know whether you can or not but I will hear you.

MR. GRUTMAN: I will try. Doesn't it bear in som

respect in the considerations we are taking into account on the applicability of Section 98?

THE COURT: That is not what is being asked.

MR. SHAW: I am trying to ask those questions.

Q In considering the applicability of Section 98 of the Partnership Law to a transaction, would it be relevant to determine whether the person relying upon Section 98 was himself in violation of the partnership agreement?

MR. MANDEL: I object.

THE COURT: I will permit that one. Let's get an answer and go on.

Mr. Burak, you have given an opinion about the requirement of the signatures of all of the limited partners.

THE WITNESS: Right.

THE COURT: Does this question of motive of the partners in asserting certain rights, does that bear on the applicability?

MR. SHAW: That is not my question.

THE COURT: What is your question?

MR. SHAW: My question is not only motive, it is whether there was a breach on their part conceivably -- I'm not saying there was -- of the partnership agreement and whether there was a breach conceivably upon their part

of the partnership law?

THE COURT: Did you give any consideration to the fact?

THE WITNESS: I cannot recall specifically now whether we di. or did not. We may have. I can't answer that.

Q Now, if you had been adivsed that there had been a breach of the partnership law or a breach of the agreement or a motive that was coercise, in the nature of blackmail, would that have been relevant to the opinion you reached in 1971?

MR. MANDEL: I object.

THE COURT: On the legal issue that you were asked to research. Go ahead.

THE WITNESS: Your Honor, I can't answer that right now.

THE COURT: Nothing you have heard in the question is a fact. Questions are not facts.

MR. SHAW: No further questions.

MR. BIEHL: I have some questions.

MR. MANDEL: Your Honor, I would think my redirect would be a minimum of fifteen or twenty minutes.

THE COURT: Let's see how far we can go. The jury is off this afternoon. I understand the witness

will be back in town on Monday anyway.

THE WITNESS: Yes, but I would prefer to finish now.

CROSS EXAMINATION

BY MR. BIEHL:

Q You testified Andrew Newburger was a partner of the partnership in January of 1971. Do you recall who else were general partners of the partnership at that time?

A Robert Newburger, Stern or maybe two or three Sterns. I don't recall any other names now.

Q Do you know whether Charles Gross was a partner at that time?

A Charles Gross was a partner. I believe he was.

Q Do you know whether Fred Kayne was a partner in January 1971, or did you know it then?

A I really can't answer that, Mr. Biehl. I don't recall.

Q Do you know whether Charles Sloane was a partner in January 1971?

A Same answer.

Q Did you, in speaking with Mr. Freedman and in reviewing his research, form an opinion as to who would be responsible in the event there was a violation of Section 9

of the Partnership Law?

A I don't recall whether we did or did not.

Q Would it refresh your recollection if I were to say that only existing general partners would be liable for a violation of the Partnership Law, people who were partners on the date the transfer agreement was signed?

THE COURT: Does that refresh your recollection?

THE WITNESS: No, it does not refresh my recollection.

THE COURT: All right.

MR. BIEHL: That's all.

THE COURT: Mr. Mandel, go ahead.

REDIRECT EXAMINATION

BY MR. MANDEL:

Q In the negotiations leading up to the transfer agreement there was give and take, different parties at different times said if I don't get this or that I won't agree; is that correct?

THE COURT: I am going to sustain an objection to this just as I did whenever another counsel wanted to go into it.

Q Now, did Mr. Persky announce to the meeting that he was surprised and shocked that you had never told him before that there was a problem about the opinion?

MR. GRUTMAN: Not proper redirect, your Honor. I did not ask that question.

MR. MANDEL: He was asked did anything happen not in good faith.

THE COURT: Yes.

MR. GRUTMAN: That is the catch-all for everything.

THE COURT: You may answer.

A Mr. Persky did say that he learned for the first timethe night before.

Q Was that statement correct or incorrect?

A Incorrect,sir.

Q was that statement made in good faith in your opinion?

You don't want to answer, okay.

THE COURT: The question is withdrawn.

Q Now, Mr. Persky was acting as liaison for the whole grop in trying to reach agreement; is that correct?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

Q Who was communicating with the subordinated lenders during the negotiations?

A Mr. Persky was primarily in charge.

Q To your knowledge did Mr. Persky communicate to anyone in advance of the closing the fact you had told him you could not give an opinion because you believed the consent of all the limited partners was required?

A I have no idea whether or not Mr. Persky communicated that.

Q From the actions of the persons present on February 11th wasn't it clear --

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

Q -- wasn't it clear that they had not heard that before because Persky said to them, this is the first time I hear of it?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

THE COURT: Sustained as to form.

Q When Persky said that I just learned yesterday that the Rosenman firm wouldn't give an opinion as to the legality of the transfer, did anybody say, what do you mean, or words to that effect? You told us that a week or two weeks ago?

MR. GRUTMAN: Objection.

THE COURT: Overruled.

A I don't recall a statement to that effect.

Q Now, you say that it was unusual for the attorney, for the buyer to issue an opinion as attorney for the seller, that the seller was legally authorized in the transaction; isn't that what you said?

A I said in my opinion it is unusual, yes.

Q It is more than unusual, isn't it?

MR. GRUTMAN: This is redirect examination. It is Mr. Mandel flinging the words in the witness' mouth. It is argumentative leading and repetitive.

THE COURT: I will sustain it on the grounds of form.

Q Have you ever in your entire practice encountered another case like this where the attorney for the buyer acted as special counsel for the seller to opine as to the legality and authority of the seller to sell?

MR. SHAW: Objection, your Honor. We would be willing to concede that each case is different.

Did you ever run across another case like this?

THE COURT: No, but the problem is this came out during one of you gentlemen's cross examination where you asked him whether there was any question about Mr. Persky good faith.

MR. GRUTMAN: No, Judge. I asked was there any impropriety, if there was complete disclosure and

consent, and your Honor said I couldn't ask that.

THE COURT: Before that you asked was there anything that put the good faith of Mr. Persky in question that evening and he said that the only thing that he found unusual was the fact that he was giving an opinion when he was representing both sides.

MR. GRUTMAN: With complete disclosure and consent.

THE COURT: I am saying that, I think, opens the door to what is meant. Since you brought out that fact I think what is meant by it can be brought out.

MR. GRUTMAN: Brought out against the background of disclosure or consent. And entirely different thing if it was sub rosa or without consent.

THE COURT: Since the door is opened I am going to permit this.

A Well, I myself have not come across this but I think there are many transactions where with knowledge and consent an attorney could represent both sides in a transaction. You find this in real estate transactions. There are a number of situations where an attorney can represent both sides, but I don't know of any situation similar to this where the firm would give an opinion for both sides of the transaction.

Q And going even further, have you ever heard of a situation where, after the attorney for the seller refuses to give an opinion of regularity because he believes it is irregular, the attorney for the buyer came in and said that I will give such an opinion as special counsel for the seller?

MR. GRUTMAN: Objection.

MR. SHAW: Objection.

THE COURT: Sustained.

Q You were asked if you permitted your client to do something on cross examination. The fact is that your client signed an agreement which you advised him was not properly authorized by the partnership; is that correct?

A I don't want to fence with language here. We had told Mr. Newburger our position. Mr. Newburger went ahead and signed it. I believe everybody else went ahead and signed the agreement.

Q Everybody in that room knew your position; right?

MR. SHAW: Objection.

THE COURT: Overruled.

A Yes, because after Mr. Persky made his statement I responded.

Q And what did you say?

A I have already testified to that. I said that we did not agree; that we felt that the signatures of all of the limited partners were necessary.

Q And do you know the function of an attorney's opinion?

A That's a question which is very difficult to answer. An opinion could be for almost any different reason, Mr. Mandel. You would have to be more specific.

Q To your knowledge does an attorney's opinion in some cases provide prima facie evidence which may protect a person from a criminal charge of knowingly doing something wrong?

MR. GRUTMAN: Objection.

THE COURT: Sustained.

MR. MANDEL: That is a perfectly proper question.

MR. GRUTMAN: That is improper for counsel. You are running the Court.

MR. MANDEL: Everytime you rule against my friends. Then there is five minutes of argument. I am never given a chance to open my mouth on a very important question.

THE COURT: Ask the witness what was the functio of the opinion letter here, Mr. Mandel, if you will.

Q What was the function of the opinion letter you were expected to render here?

A The opinion letter here was one of the conditions precedent to closing.

Q Did it have any other function so far as you knew?

A Again, you know, function, I'm not sure if I follow you. I think people certainly were looking to rely on an opinion otherwise they wouldn't have asked for it.

Q Was there any discussion after you announced that you believed the transaction to be unauthorized as to whether the deal should be dropped?

MR. GRUTMAN: That's not what he testified. He said he wouldn't give th opinion. That's all he said.

THE COURT: He has asked him whether there was any conversation of that nature following that statement. There was or was not.

MR. GRUTMAN: It was after you stated it the deal was unauthorized. I don't believe he testified to that.

THE COURT: Did anybody say the deal should be dropped. Did anybody say that?

THE WITNESS: I don't recall anybody saying that.

Q Do you recall Mr. Steefel saying the deal could

not go ahead without an opinion letter?

A I don't recall it. I believe he was at the closing but I don't recall him saying it.

Q Do you remember after you made your statement different conferences were held by different persons in different areas of the room or at different rooms at Finley, Kumble?

A No, I don't.

Q Now, on cross examination you said all the other attorneys permitted their clients to sign.

A Well, if I said that then I really should correct that because I have no idea as to whether they permitted their clients to sign or not. The fact was that, to my knowledge, they signed. Whether their attorneys permitted them or not I can't answer that.

Q Apart from Mr. Persky did you hear any attorney say I believe my client should sign because I agree with Persky and not with Burak?

MR. GRUTMAN: I object to that question. This wasn't a contest, Judge.

THE COURT: Overruled.

Did you hear any such statements?

THE WITNESS: I did not.

MR. MANDEL: No further questions.

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THE COURT: Step down.

(Witness excused)

THE COURT: We will be in recess until 10:00 o'clock Monday morning.

(Jury leaves the courtroom)

MR. GRUTMAN: Your Honor, we are still going to try to do whatever we can to finish the case in time for your staff not to abandon you and leave you bereft while the case continues.

The case is still with Mr. Mandel. So far as I know on the basis of depositions and the like there is only one other witness or perhaps two other witnesses that I am aware of that Mr. Mandel might call.

If we could have some guidance, we would start preparing to bring witnesses in. We have some that are in Massachusetts and others in California and I would make a good faith effort to finish this case by Friday if Mr. Mandel will let me know what the marching orders are.

THE COURT: We will have to finish the proof by the end of Wednesday.

MR. GRUTMAN: That is a possibility if Mr. Mandel could finish on Monday afternoon.

MR. MANDEL: I bring in what I think is a one-hour witness and the whole morning was consumed. I didn't

jg:mg

Newburger, Loeb & Company, Inc.

v.

Charles Gross, Mabel Bleich and Gross & Company

71 Civ. 685

v.

Newburger, Loeb & Company, a New York Limited Partnership, et al.

July 14, 1975
10:00 a.m.

(Trial resumed)

(In open court, jury present)

MR. MANDEL: Your Honor, I would like to read into evidence certain portions of the deposition of Michael A. Bamberger, taken in this case in May 1974.

May the record show that Mr. Bamberger is a partner of Finley, Kumble, one of the additional defendants herein.

MR. GRUTMAN: Mr. Bamberger is going to be here to testify and I don't know the reason why we burden the record twice.

THE COURT: I don't know. This is Mr. Mandel's privilege, to read testimony of an adverse party.

MR. GRUTMAN: He is within 100 miles.

THE COURT: And he is also an adverse party, which can be used for any purpose.

Go ahead.

MR. MANDEL: I start with page 5, line 5, and go to line 25 on that page.

THE COURT: Do you intend to read from other depositions during the day, Mr. Mandel?

MR. MANDEL: I am not sure. It depends on how the timing goes. I have a witness scheduled to run --

THE COURT: I have in mind that if you announced it now, everybody could have their copies on the table by the time you got there and we would save the time of somebody looking.

MR. MANDEL: I might be reading from Andrew Newburger's deposition.

THE COURT: Mr. Grutman, do you have a copy there?

MR. GRUTMAN: I don't, Judge.

THE COURT: You don't have a copy in front of you at the table?

MR. GRUTMAN: Not at the moment. What I have is my abstract.

MR. MANDEL: I have a copy.

MR. GRUTMAN: What I do customarily, Mr. Mandel, is that I mark my own copy.

Tell us the lines and I'll make a note.

MR. MANDEL: Page 5, line 5 to page 5, line 25.

"Q During the year 1970 were you a member of any law firm?

"A No, I was not.

"Q Were you associated with any law firm?

"A Yes, I was.

"Q What was the name of that firm?

"A Finley, Kumble, Underberg, Persky & Roth."

THE COURT: Mr. Mandel, could the record show in these depositions that the witness was under oath and when it was taken in each case, before you start?

MR. MANDEL: Yes, sir. This was on the 17th day of May, 1974, and the witness was first duly sworn by a notary public.

THE COURT: Very well.

"Q What was the name of that law firm?

"A Finley, Kumble,Underberg, Persky & Roth.

"Q Were you associated with that firm during the entire year of 1970?

"A No, sir, commencing approximately January 15th of that year.

"Q Until the end of 1970?

"A Yes, sir.

"Q Were you a member of that law firm throughout the calendar year 1971?

"A No. I became a member of the firm on February 1, 1971.

"Q Were you associated with the firm --

"A During January.

"Q -- from January of 1971?

"A Yes, sir."

MR. MANDEL: I now go from page 43, line 17 to page 58, line 10.

"Q On the 11th?

"A On the 11th. Well, the Rosenman firm -- and I'm not so sure, I have no recollection at this time whether it was Mr. Burak at that meeting or Mr. Freund or Mr. Doskow-- but, that is, I don't know who it is, I believe it was Mr. Burak -- said that when in the course of putting the documents together,we got to the fold, are for the opinion of Rosenman -- Mr. Burak said that they could not or that they had trouble or whatever the terminology was given, the opinion with respect to --

"Q Let me interrupt you."

There was some colloquy.

"A With respect to Section 98.

"Q If I may ask at this time, just what did he say?

"Did he say they had trouble or they would not do it?

"A The bottom line was they would not. I don't know if hephrased it in terms of 'We have trouble and therefore we can't' or whatever, but the end result was that Rosenman said that they would not be able to give that opinion.

"Q Who was present when they said that?

"A You mean to whom did Mr. Burak speak? I don't remember.

"Q No. Who was present and heard? You heard him, right?

"A Yes, sir.

"Q You were not alone with him at that moment, were you?

"A There were in our office some 40 people and I do not know who heard him say it.

"Q A large number of people heard this conversation?

"A The people who didn't hear it in the beginning heard it or heard about it very shortly, because it became the subject of discussion among counsel, and counsel advised their clients of the situation."

MR. GRUTMAN: The next question is not answered.

"Q It caused a furor in fact, did it not?"

I skip colloquy.

"A It was a surprise to everyone, including Mr. Burak's clients, I gather.

"Q And it threatened the deal, did it not?"

I skip colloquy.

"Q Threatened to abort the deal, did it not?

"A It created one more problem and we had four hundred problems in the prior two months. Yes, it created a problem.

"Q When Mr. Burak said this, somebody argued with him, didn't they?

"A I would not say argued. There was a discussion, and to the best of my recollection Mr. Burak's position was that the decision was not Mr. Burak's but that he was not authorized on behalf of his firm and therefore there was no point in discussing it with him."

MR. GRUTMAN: There is no answer to the next question.

The next question is at line 12.

MR. MANDEL: I skip some colloquy.

"Q Didn't Mr. Burak say they couldn't give a legal opinion that the transaction was authorized under Article 98 without the consent of all parties because they didn't believe it was?

"A No, he did not say that.

"Q What did he say?

"A Again, to the best of my recollection, talking about something that happened nearly four years ago, what Mr. Burak said is that his firm or his partner had decided that they could not give the opinion requested because they could not find a case on point on this question.

"Q Did he say anything about their opinion regarding the meaning of the language without cases in point?

"A He did not say that they felt the law was the other way. By 'the other way' I mean Mr. Burk did not state that they felt-- Mr. Burak did not state that it was their opinion that Section 98 prohibited the transfer.

"Q Did you attempt to persuade Mr. Burak to give the opinion letter?

"A A large number of lawyers were there and a number of them discussed the question with Mr. Burak, and Mr. Burak, to the best of my recollection, indicated that he had no leeway on the point since it was not his final decision and the decision had been made.

"Q Did he say who actually made the decision?

"A No, sir.

"Q Who were the lawyers who spoke with him about it?

"A He had -

"Q The ones you can remember.

"A Who spoke with him? I have no specific recollection as of this moment who spoke with him about this matter.

"Q Did Persky say anything about it?

"A I believe Persky did.

"Q Do you remember what Persky said?

"A No, sir.

"Q Did you say anything?

"A I certainly told him -- I don't remember what I told him, except for the fact that I remember distinctly telling him that I was surprised and that it was a hell of a way to tell us now rather than prior to the date of closing

"Q You expressed some indignation?

"A No."

Continuing the answer.

"A No, generally, when people have problems giving or providing a legal document for a closing, somebody finds out about it before the morning of the closing.

"Q Did Ned Frank say anything?

"A I have no recollection.

"Q Did Mr. Steefel say anything?"

And may we agree that this was Mr. Steefel?

MR. GRUTMAN: Yes.

"A I don't know whether Mr. Steefel said anything.

"I have no specific recollection that Mr. Steefel was there that morning.

"Q Did Mr. Abrams say anything?

"A I have no specific recollection who said what to Mr. Burak. I know there was a general discussion among counsel, among certain or numbers of counsel there and Mr. Burak on this question.

"Q How long did that discussion last?

"A I have no recollection at this time. It was not a two-minute discussion, on the one extreme, and it certainly was not more than one hour on the other extreme.

"Q Is it your best recollection that it was closer to an hour than ten minutes?

"A I really have no idea, no recollection between those two extremes.

"Q Did you inform any of the parties to the proposed agreement of this development?

"A We informed our client, several of the parties, who were, to the best of my recollection, involved in the discussion with Mr. Burak, or at least were present during the discussion with Mr. Burak. My recollection is that the other counsel, at least certain of the other counsel, discussed it with their clients.

"Q When you say 'We informed our clients,' who do you

mean by 'we'?

"A 'We,' I mean Mr. Persky and myself with the firm of Finley Kumble.

"Q When you say 'our client,' whom do you mean?

"A Our client was the corporation and we advised, to the best of my knowledge, Mr. Risher and Mr. Muh. I don't remember if Mr. Kayne was there.

"Q Did you give this information --

"A One more thing. We also -- no, pardon me. Strike that.

"Q Did you give this information to Mr. Risher and Mr. Muh before or after the papers were signed and the deal was closed?

"A Before. They were there.

"Q Did you advise them that this might threaten the consummation of the proposed deal?

"A To the best of my recollection, we advised them that there were three alternatives, that there were at least three possibilities. N . 1 is that the deal could founder, lacking the opinion set forth in the December 31 agreement; No. 2, in fact, I think we talked about, too-- (1) it could founder, and (2) that the opinion could be waived. That was discussed by whoever benefited by the opinion.

"Q Pardon? That was discussed by who?

"A No, not discussed. It could be waived by whoever could properly waive it under the agreement.

"Q Was this in a conversation between you and Persky and Risher and Muh?

"A Yes, sir. I believe this was at a time where various attorneys were talking to their clients as to the situation.

"Q Was anybody else present when you and Mr. Persky were talking to Risher and Muh?

"A I have no specific recollection. It may well have been Mr. Berkowitz. It may well have been Mr. Kayne."

I skip --

MR. GRUTMAN: There is a further answer at line 19, Mr. Mandel.

MR. MANDEL: I skip colloquy.

MR. GRUTMAN: I object on the grounds that line 19 is part of the former answer.

THE COURT: It doesn't really modify it because the answer starts over by saying he has no recollection.

MR. GRUTMAN: But "I don't know" is what he winds up saying.

THE COURT: All right.

MR. MANDEL: Where do I continue, your Honor?

THE COURT: Read 18 and 19.

MR. MANDEL: 18.

"Mr. Roth"-- may the record show that Mr. Roth was a member of Finley, Kumble present at this deposition -- interjected --

"Mr. Roth: But you don't know for sure?

"The Witness: But I don't know.

"Q There were other people present in the room at that time?

"A And I'm not sure if we spoke to Mr. Risher and Mr. Muh simultaneously.

"Q You say that some of the parties to the agreement -- I'm going back now to the discussion with Burak -- some of the parties to the agreement, to the proposed agreement, spoke to Burak.

"Can you remember any of the parties who spoke to Burak directly rather than through their counsel? For example, Andrew Newburger, did he speak to Burak about this question?

"A I didn't say that the parties spoke to Burak. I said I believed some of the parties were at least present during the discussion with Mr. Burak.

"Q I accept that. I believe that's right.

"A I believe - - I don't know. It is hard to remember it. Mr. Newburger, to the best of my recollection,

was present at the closing and may well have been involved. I believe Mr. Stern was present.

"Mr. Roth: Let me have first names.

"Mr. Mandel: That's a very good suggestion."

I skip some colloquy.

"A Mr. Andrew Newburger, to the best of my recollection, was at the closing. That can be checked.

"I believe Mr. Robert Stern was at the closing.

"I believe there was previously marked a closing binder, which we have prepared, which has a list of who was there. I don't now, nearly four years later, remember who participated or who was in the room during this discussion.

"Q How was this question ultimately resolved?

"A The question was ultimately resolved by -- well, the final resolutionwas that Finley Kumble gave a limited opinion, as,I believe, special counsel.

"Q Whose idea was it that that be done? Who first suggested it?

"A One of the counsel to one of the general partners. If you asked me who, I don't remember, so I will save you the question.

"It came up in the context-- there was a question of whether to go ahead or whether not to go ahead. One of the counsel, I believe it was for general partners, it was

for one of the group separately representing -- whether limited partners or general partners or subordinated lenders, I don't know, for some reason limited partners sticks in my mind -- on the question of whether to go ahead or whether or not to waive, someone asked Mr. Persky what his view of the legal question was, and Mr. Persky at least stated his view and he was then asked, rather than simply waiving the opinion, whether an opinion could be given to the partnership by Mr. Persky directly or by Finley Kumble by Mr. Persky, recognizing that they were representing the transferee rather than the transferor.

"There was a discussion among the assembled masses of counsel and that was the final request made by them.

"Q When you say 'Mr. Persky gave his view of the question, what did he say? What was his view?

"A I think it is expressed in the opinion letter.

"Q Is that what he said? Did he use those words?

"A Let me say, No. 1, I don't have the opinion letter, so I don't know what the words in the opinion letter were. But in substance the opinion he gave orally was ultimately reflected in the written opinion letter.

"Q In effect, he said that in his opinion, the transaction could be closed without the consent of the

partners, is that correct?

"A I cannot say specifically what he said. What he said was reflected in substance in the opinion letter."

And I'm skipping colloquy.

"A And that is the way the matter was resolved.

"Q Mr. Bamberger, different attorneys who were present gave their opinions on the question orally, isn't that correct?

"A There was a discussion of Section 98, yes, sir.

"Q In which a lot of attorneys participated, is that correct?

"A Yes, sir.

"Q Can you recall, besides Burak, Persky and yourself, any attorneys who participated in that discussion and expressed opinions?

"A Not specifically. All I know is that in -- it came down in the end to the question of each attorney had to ask, to the extent that he agreed -- that is badly put -- because Mr. Burak didn't say he thought the transfer was barred either, just that he could not give it an affirmative opinion for lack of authority. Nobody, to the best of my recollection, took the opinion in the discussion that the transaction was barred, because I presume otherwise they wouldn't have advised the clients to sign the agreement and

consummate the transfer.

"Q Did any attorneys express doubts?

"A Nobody was sure. Where you have a situation where there are no cases, there is always doubt. There is even doubt sometimes when you think you have a case your way. Certainly when there is not a case either way, it is not a black and white question.

"Q My question is, did anybody express doubts?

"A It was generally recognized that this was not a clear legal question, yes.

"Q Was there any discussion of it at that time, of the possibility of a litigation concerning this transaction?

"A Well, there were certainly discussions had, where you had at one point threatened preliminary injunctions and one of the questions raised was, was there a preliminary injunction sought, and the answer to that was no, because we checked with Special Term, Part II before closing.

"Q My question is, during the discussion of what to do about the legal opinion that Burak wasn't going to give, during that discussion, did anybody say anything concerning the effect of not having an opinion letter upon a subsequent litigation?

"A I don't remember.

"The discussion or the whole transaction was in terms of the various threats that had been made on behalf of Mr. Gross, Miss Bleich or Mrs. Donohue over the preceding period.

"I don't recall a discussion where the question of whether or not to waive the opinion letter was tied with the lawsuit.

"Q Did anybody say that, since there seemed to be such serious doubt, perhaps the deal should be dropped?

"A Not to the best of my recollection.

"Q Was there any discussion at all as to whether the deal should be dropped in view of this agreement, that is, Burak's inability to give an opinion on behalf of the Rosenman firm?

"A That was one of the possibilities raised. But to the best of my recollection it was not seriously considered.

"Q Do you remember what was said about that possibility of dropping the deal?

"A No, sir.

"Q Did you or did Persky advise your client to go ahead with the deal in any event?

"A My recollection is we advised our clients of the

facts and the decision and they decided" --

MR. GRUTMAN: I must object. There isn't anybody more mild-mannered than Michael Bamberger, and this intonation that Mr. Mandel is giving is really, I think, unfair and slanted.

THE COURT: You are correct.

MR.MANDEL: I will continue

"A --and they decided that they would be willing to proceed.

"Specfically answering your question, I do not recall a recommendation from either myself or Mr. Persky."

I now go from page 59, line 18 to 66, line 9:

"Q Do I understand you correctly that you and Mr. Persky, together with Risher and Muh, and possibly Berkowitz and some others representing the corporate client, left the general meeting and went into Mr. Persky's office and had a confidential discussion concerning the question of whether to go ahead with the deal?

"A What I said before was following the general discussion the various counsel consulted with their respective clients in various places throughout the office. We were there in two large rooms, the large conference room and the library, which is a larger conference room, because there were so many of us,and people went and consulted

their clients either in person or by phone and various people had discussions with their clients as to what happened and what the possibilities were in light of what had happened, what happened being Mr. Burak's statement with respect to giving the opinion by the Rosenman firm.

"As part of that, Mr. Persky and I, to the best of my recollection, went into Mr. Persky's room and discussed it with representatives of the corporation.

"To the best of my recollection, I was not there for that entire discussion, but I was there for the beginning of it.

"Q After those various separate discussions, did the meeting then reassemble?

"A Can you give 'meeting' a little more coherency than it has? Following the separate meetings there were various meetings between groups and I'm sure you are well aware, spending a lot of time on this matter by you, that one of the problems in putting together the transaction was that there were some divers interests. Where people might have one interest for one purpose, they would not for another purpose. There were various meetings within groups, between groups, and generally there was a meeting of a larger group.

"I don't know, if you say the entire meeting

reassembled, whether this discussion was coalesced, perhaps.

"Q At the point where the discussion was coalesced and the groups reassembled, did the various groups report what their separate decisions had been concerning this question?

"A I don't -- it was not really a reporting of decision but a mutual discussion of the situation, having been informed as to, I presume, by each client, what the parameter of his views or possibilities were.

"Q Did somebody make a report to the others about what the corporation had decided? Did you or Mr. Persky or Mr. Risher or Mr. Muh or anybody else say the corporation is willing to go ahead on the basis of Mr. Persky's opinion?

"A You have jumped a step. At that point we didn't have Persky's opinion. What we had was the lack of a Rosenman opinion. Then there was the part that I related previously, where again I will qualify the whole discussion.

"It was a meeting with a lot of people a long time ago. But to the best of my recollection,and counsel, one or more counsel for some of the individuals involved in the partnership asked Mr. Persky what his view of the law was.

"I don't suppose you want me to go through the story again.

"Q I don't quite understand the timing. When they

asked for Persky's view of the law, was this before or after the individual clients had been consulted with?

"A Following, to the best of my recollection.

"Q It was following?

"A Following, to the best of my recollection, and I may well be wrong. Just looking back on it today, it was following.

"Q So after what we will call a separate caucusing somebody asked for Persky's view and Persky said --

"A Persky stated a view which subsequently was reflected in substance by the opinion letter signed by him on behalf of Finley Kumble.

"Q Yes? Then what happened?

"A Then there was further discussion.

"Q General discussion or separate discussions?

"A General discussion. Then, to the best of my recollection, it was suggested by someone, and I have no recollection who, that they would prefer that a -- that they would like to go ahead, but they would like to go ahead having some written indication of the Finley Kumble view, even though Finley Kumble was representing the transferee rather than the transferor. That became the consensus of the meeting.

"Mr. Persky was asked whether he would be willing

to state his opinion in written form or his view as an opinion in written form. My recollection is that Mr.Persky said he would try to write down what it was and come back and see whether this would meet the approval of the group and then the opinion letter was written.

"Q Excuse me. How was it written? Did Persky go away? Was there a stenographer there? Did Persky go to another room?

"A This was in our office. I might --

"Q During working hours?

"A Yes, during working hours, so there were stenographers around. To the best of my recollection, Mr. Persky went to his office and did a draft.

"Q He was alone doing the draft, is that right?

"A I have no idea.

"Q How long did it ake him?

"A I have no idea.

"Q What did everybody else do while Persky --

"A We had lots of other little questions remaining and documents to be signed and things to be checked and so on.

"Q At any point, did anybody ask whether any other counsel present would be willing to give a written opinion on behalf of the partnership?

"A The answer to your specific question is,

not to the best of my recollection.

"Q Some of the general partners were there, with their attorneys, weren't there?

"A My best recollection is that there were at least twelve counsel there.

"Q Representing general partners?

"A Representing different kinds of people. There were counsel representing general partners, yes, sir.

"Q Did anybody ask whether it would be appropriate for one of the counsel representing one of the general partners to give this opinion, rather than an attorney representing the corporate buyer?

"A No, sir.

"Q Did anybody speak about a question of conflict of interest in connection with the buyer's attorney giving the opinion, as special counsel to the seller?

"A Nobody spoke of conflict of interest in those terms, but one of the points that was raise, to the best of my recollection, by, I believe, Mr. Persky, was the fact that it was unusual to do it this way.

"Q It was unusual?

"A Yes, sir, because -- but if that was what was desired by the transferees, who were advised by counsel, that it would be acceptable to the transferor. I got it backwards.

"If this were desired by the participants in the transferor, who were advised by counsel, with knowledge of the position of the Finley Kumble firm, that Mr. Persky would be willing to do it. On that basis, on the fully disclosed basis.

"Q Was there any discussion of the propriety of Mr. Persky purporting to represent the partnership in this capacity, when some of the partners were not consulted?

"A No, sir.

"Q You knew, did you not, that Bleich and Donoghue were not consulted as to wehther Persky could represent the partnership for this purpose? The answer to that is yes?

"A Yes. They were not consulted.

"Q You knew that?

"A Yes, sir.

That's the end of this reading.

MR. GRUTMAN: Your Honor, may I read from other sections?

THE COURT: You may.

MR. GRUTMAN: I would like to begin at the place where Mr. Mandel left off, at page 58, line 10, and read the section he omitted.

Beginning at page 58, line 18:

"Q Did you have a confidential discussion with any

persons representing the corporation as to whether the corporation should go ahead with the deal or should drop it?

"A As I believe I said to you just before the break, there was a meeting where we consulted, Mr. Persky and myself, to the best of my recollection, consulted with representatives of the corporation and I went through that. I couldn't remember exactly which representatives we were discussing with, but to the best of my recollection, it was Risher and Muh and possibly Berkowitz.

"Q Was that discussion confidential?

"A There were no third parties present. To the best of my recollection, it took place in Mr. Persky's office.

"Q Do I understand this correctly? You and Mr. Persky and your clients, left the general meeting and went to Mr. Persky's office"--

Mr. Mandel withdrew that question,and the next question, I believe he read.

Page 29 --

MR. MANDEL: Give me the lines you intend to read.

MR. GRUTMAN: Page 28, line 14.

MR. MANDEL: Wait just a second, please,so I can see whether I object to it. Line 14 to where?

MR. GRUTMAN: Probably to 31.

MR. MANDEL: What line?

MR. GRUTMAN: I'm not sure exactly. I don't have my copy.

MR.MANDEL: You won't go beyond 31?

MR. GRUTMAN: I don't believe so, but if I do, I'll let you know.

MR.MANDEL: All right.

Would you hold on for just a second, please?

MR. GRUTMAN: Surely.

(Pause)

MR. MANDEL: No objection.

MR. GRUTMAN: Page 28, line 14.

"Q Before February 11th, had you ever heard me, that is, Philip Mandel, say that the agreement could not legally be authorized without the consent of everybody?

"A I have no such recollection, as I believe I said earlier, I -- most of the meetings that were held with you, I was not present at, and I do not recollect a meeting with you, where you said that, no, sir.

"Q Before February 11th, had you heard from anybody else," that I had said that?

"A I had heard - - read that question back, please."

And the question was read back.

Mr. Bamberger then said:

"A To the best of my recollection, I had heard from someone that the position that Mr. Mandel was taking was that the transfer agreement would require the signature of his clients and that this was one of the points that were raised during the negotiations with Mr. Mandel and I believe with Mr. - with various persons from Golenbock and Barell, representing the two ladies.

"Q Did you personally make any effort to ascertain whether the position I was taking was legally well founded?

"A Yes.

"Q What effort did you make?"

THE COURT: Mr. Grutman, you had better show that Mr. Mandel is questioning, and, therefore, when he says, "the position I was taking" in that question is Mr. Mandel.

MR. GRUTMAN: Yes. The questioner is Mr. Mandel.

THE COURT: Mr. Mandel was doing the questioning.

"A In January of 1971, in connection with the discussions with Mr. Burak -- what is the name, Burak of the Rosenman Colin firm, putting together the various -- putting together is the wrong word -- negotiating the specific language of the various closing documents required for the closing which eventually took place on February 11th, one of the points we discussed was the opinion to be given by the Rosenman firm and in connection with that discussion, we did

some research on the question of the applicability of whatever the appropriate section --

"Q Article 98 of the partnership law?

"A Right.

"Q Who did the research?

"A You mean who physically went down to the library and dug it out?

"Q Yes, you said we did the research.

"A OK. One of the associates in the firm, who then reported it to me. I do not know at this moment what associate did it.

"Q Did the associate give you a written report? Was there a memorandum of law created?

"A I do not, as of this moment, know.

"Q You hadn't looked?

"A I have a recollection that -- I have a good recollection that I received Xerox photo copies of cases from various states, with respect to predecessors to Section 98. My recollection being that the problem in researching this question was that there were no casesin point under Section 98.

"Q I am going to ask you to search for and produce whatever legal memorandum you got or created or may exist"--

There was colloquy --

"Q In the Finley Kumble file."

There was no answer to that question. There was colloquy between counsel.

MR. MANDEL: May we stipulate that no memorandum was ever produced and no research notes were ever produced?

MR. GRUTMAN: I'll read this over. I'm not sure that that is the state of it today, Mr. Mandel.

MR. MANDEL: Are you skipping to page 32?

MR. GRUTMAN: Just a moment, please.

(Pause)

Going over to page 34, line 10.

MR. MANDEL: Hold on a second.

MR. GRUTMAN: I'll read it, Mr. Mandel.

MR. MANDEL: I want to know whether I object.

MR. GRUTMAN: I don't know. I'm sorry, Mr. Mandel I did not know you were going to read from Bamberger's deposition. I don't have my copy with underlinings. All I have is an abstract that does not give a delineation.

THE COURT: Go ahead.

MR. GRUTMAN: It probably goes to 36 or 37.

MR.MANDEL: OK. No objection.

MR. GRUTMAN: I will read.

"Q Do you recall what you did and whom you consulted after you received the results of the research from an

associate?

"A Well, there were further discussions with Mr. Burak. To the best of my recollection, I conveyed on the telephone to him or maybe personally -- for some reason I have a recollection of speaking to him on the telephone -- to him, the types of cases we had found and perhaps the names of the cases and suggested that he might find them helpful, because he had indicated that he was having trouble finding cases in point on this question.

"A I assume that I did. I do not have any specific recollections. Mr. Persky was the partner in charge of the matter.

"Q The work that you did in connection with the negotiations for the sale of the assets or business of Newburger, Loeb was done by you as Mr. Persky's subordinate, is that correct?

"A Yes, sir.

"Q That was true during the time that you were an associate of the firm and also during the time you were a partner of the firm?

"A The answer is yes, yes, while -- strike what I said and let me start it in a different way. There was a division of responsibility between Mr. Persky and myself with the understanding that Mr. Persky was senior to me and

a person whose client this was and who was in charge of that. What I am trying to say is, Mr. Persky did not review all of my work, for obvious reasons, step by step.

"Q Do you recall any discussions you had with Mr. Persky on the question of the legality of the proposed transfer, without the consent of all parties?

"A No, sir. As I told you, I have no specific recollection. I have recollections of discussions with Mr. Burak, where we discussed the law, the cases, what cases he had found and what cases we had found and the method of approach.

"Q I would like to go back now to your discussions with Mr. Burak, for the purpose of establishing as much as we can about those discussions. First, can you tell me about when you had the first discussion with Mr. Burak concerning the application of Article 98 of the New York Partnership Law?

"A Sometime in January. I really do not know where.

"Q Would you say that came about as a result of the position that I had taken? I, Philip Mandel.

"A That came about because of the likelihood, at some point, that Mr. Gross, Miss Bleich and Mrs. Donoghue, would not become parties to the transfer document.

"Q Do you recall the first time you discussed this

legal problem with Mr. Burak?

"A Sometime during January.

"Q Did he initiate the conversation with you?

"A I have no idea. We were talking on a fairly regular basis because his firm represented the transferor and we represented the transferee and there were a hell of a lot of documents where there were open questions that had to be worked out and not only closing documents but as you probably know, the transfer document was modified during the period -- the December 31 agreement signed on December 31 was modified to the -- as of December 31 agreement, which was signed on February 11, and so there were a number of those changes and the changes to the schedules resulted in conversations between Mr. Burak and myself.

"Q Would you say during that period, from January 1 until February 11 of 1971, a major part of your time was devoted to this deal?

"A I don't know about a major part. It certainly was a substantial portion of time.

"Q Do I understand it right that you were in frequent contact with Mr. Burak during that period?

"A Yes.

"Q Would it be correct to say that you spoke with him frequently on the phone and met with him on a fair number of

occasions?"

Colloquy.

"A I spoke with him on the phone more often than I met him.

"Q What was the substance of your conversations with him concerning the Article 98 question?

"A They were not long, long conversations, because this was one of a number of things we were talking about. At some point, Mr. Burak mentioned to me - - I think it was more towards the end of January than towards the beginning, that they were having trouble finding cases which were directly in point either way and what had we done. I said we had done some preliminary research and we had found basically that there were no Section 98 cases one way or the other, but there were certain older cases that were helpful and these were the Xerox cases that we were mentioning before. To the best of my recollection, I gave Mr. Burak either citations or names or types of cases or whatever and he said he was going to look into it and this was --

"Q Did you tell Mr. Burak whether you had formed a conclusion?

"A Yes. Strike the word "yes." At this time, I do not remember whether I told Mr. Burak that I had formed a conclusion.

"Q At any point prior to February 11th, did you tell Mr. Burak you had formed a conclusion?

"A I do not recall. I do not recall any particular great discussion about it, because I did not know until the closing that the Rosenman firm would have a problem about giving the opinion called for.

"Q In fact, had you formed a conclusion with regard to the question of law, concerning Article 98?

"A Yes, sir.

"Q What was your conclusion?

"A My conclusion was represented by the limited opinion given in the - - given on, I believe, the 11th of February.

"Q You mean the opinion letter that was signed by Mr.Persky?

"A Yes, sir.

"Q In connection with the closing?

"A Yes, sir.

"Q Did you draft that or did Mr. Persky draft that letter?

"A I do not know.

"Q Do you have a best recollection either way?

"A My best recollection is that he drafted it, but I do not know.

"Q When did you form that conclusion?

"A I formed that conclusion based on the research that had been done for us by the young associate, by discussions he had had with me and by some research that I had done myself.

"Q Do you recall what research you did yourself?

"A Yes, sir.

"Q What did you do?

"A I went to the library and read all of the cases cited under Section 98.

"Q You mean as indicated under the McKinney's --

"A No, not McKinney's. In the uniform laws -- the green book."

Would your Honor tell the jury that McKinney's is a pubisher who collates these various legislative enactments under various headings, the partnership law being one of them?

THE COURT: Well, McKinney's is a law publisher and publishes the statutes, and underneath the statutes, McKinney's put, to the extent that its editors deem them to be applicable and ascertain them, little digests of cases that bear on the statutes that are listed in the publication.

Go ahead.

MR. GRUTMAN: Thank you, your Honor.

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"Q Was your opinion unqualified?"

Then the question was repeated.

"Q No, the conclusion that you reached.

"A My opinion was qualified by the fact that I could find no specific case one way or the other, which is always a qualification, because it means that the issue has not been decided by a court and certainly not by a New York court, but in my opinion, my personal opinoin, based on the research I had done that it would be proper for a court to find, as we stated in the letter of February 11, which is, I think, what a lawyer's opinion gets down to, particularly where, as in that letter, I believe, and I have not seen that letter in a number of years, my recollection is that there is a specific statement that there were no cases in point or some reference to it.

"Q At what point did you transmit this conclusion to Mr. Burak?

"A I know I transmitted it on the 11th of February, when he said they were having problems, which was a surprise.

That ends at page 41, line 17.

Page 22, beginning at line 12:

"Q Were you aware at any time during November or December of 1970 or January or early February of 1971 that there was a problem concerning the opposition of Charles

Gross and Jeane Donoghue and Mabel Bleich, to the proposed transfer of the assets of the Newburger Loeb partnership to a new entity?

"A Yes, sir. I am not sure whether I would choose the word 'problem' to define it. I knew that there was a question as to whether Mr. Gross, Miss Bleich and Miss Donoghue --or Mrs. Donoghue would consent. I knew this was the subject of many meetings with various of their representatives, which I did not take part in, but which I knew of and I knew that this was one of the questions that was discussed at great length, in connection with the transaction. For example, I knew at one time, I believe, you, sir, said that you might bring a preliminary injunction to stop the transfer on the grounds of the -- of Mr. Gross' opposition or Miss Bleich or Mrs. Donoghue, I'm not sure who.

"Q How did you acquire that knowledge?

"A The latter fact?

"Q Yes.

"A It was told to me by one of the parties who you presumably told it to and I do not at this time know if it was Mr. Persky, Mr. Berkowitz or one of the principals.

"Q Weren't you personally present at a meeting on January 20, 1971, that I attended on behalf of Mr. Gross

and certain others?

"A Where did that meeting take place?

"Q I believe at the offices of Golenbock and Barell.

"A I have never been to the offices of Golenbock and Barell. To the best of my recollection. I may be wrong, but to the best of my recollection, I was not there."

The last question is page 26, line 24.

MR. MANDEL: You are stopping at that point?

THE COURT: Yes, Mr. Mandel, he is stopping at that point.

MR. GRUTMAN: And I am going over to page 26, l[illegible]4:

"Q You were present at the closing on February 11, were you not?

"A Yes, sir.

"Q By the way, I have been confused from the beginning, did the closing start on February 10 and continue through the night of February 11th or did it start on the 11th or when would you date the closing, if you are able to do it better than I am?

"A The document was finally completed and signed on the 11th. There were meetings on the 10th, as well. The actual closing, to the best of my recollection, took place

the morning of the 11th. The meeting that took place through the night was the signing of the first document which was through the night of December 30, 31."

That's all I have, your Honor.

I take it that I have not waived my right to call Mr. Bamberger personally.

THE COURT: No, not at all.

Mr.Mandel, do you wish to read further portions?

MR. SHAW: I take it, also, that this has just been received in evidence as an admission and only binding on Finley Kumble?

THE COURT: No. To the extent that everyone had notice and opportunity to be present and cross-examine, it is as if the witness had testified here on the stand, binding on all parties to the extent that it is connected to parties by its subject matter.

MR. SHAW: Then I move to strike on behalf of Aixala for lack of connection.

THE COURT: Well, I'll take it subject to connection against others.

Go ahead.

MR. MANDEL: Your Honor, there is no need for connection because Persky --

MR.SHAW: Your Honor --